Torts--Contributory Negligence--Stop, look, Listen--Duty to Get Out of Car

Mose Edwin Boiarsky
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Torts Commons, and the Transportation Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol34/iss3/9

This Student Notes and Recent Cases is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
STUDENT NOTES AND RECENT CASES

TORTS—CONTRIBUTORY NEGLIGENCE—STOP, LOOK, LISTEN—DUTY TO GET OUT OF CAR.—"The' Stop! Look! Listen!' signs at railroad crossings take on new significance through a recent ruling of the United States Supreme Court.”¹ This is typical of newspaper comment which appeared as the immediate reaction to the decision of the United States Supreme Court wherein Holmes, J., said:²

“When a man goes upon a railroad track he knows he goes to a place where he will be killed if a train comes upon him before he is clear of the track * * * *.”

“In such circumstances it seems to us that if a driver cannot be sure otherwise whenever a train is dangerously near, he must stop and get out of his vehicle, although obviously he will not often be required to do more than stop and look. It seems to us that if he relies upon not hearing the train, or upon any signal, and takes no further precaution, he does so at his own risk.”

Quaere: Does the decision take on as much “new significance” as newspapers have attributed to it?

It is well at this point to consider the meaning of the court’s language. Does the court mean, when it states “if a driver cannot be sure otherwise * * * * *, he must stop and get out of his vehicle,” that if he can be sure otherwise, there is merely a duty to use the care of the ordinary prudent man? Or, does the court intend in its statement “obviously he will not be required to do more than stop and look” to lay down a standard of care requiring the driver at least to stop in all instances? If the two statements are read together, presumably the court intends to lay down a standard of care, imposing a duty to stop in all instances at a railroad crossing and, if the driver cannot be sure otherwise, then it places an additional duty to get out of his vehicle and look. Does the court intend that the driver must stop even in a situation where there is no obstruction of the tracks for several miles? Conceding that the duty imposed is to be exercised only in instances of necessity, what result would the court reach in a situation where, in a mountainous or hilly region, a train might come

¹ Literary Digest, November 19, 1927.
around a bend between the time the driver looked and the
time at which he returns and starts his automobile?\footnote{See dissent in Chicago, etc. R. Co. v. Thomas, 155 Ind. 634, 58 N. E. 1040 (1900).}

The duty placed by courts on the driver of automobiles
upon his approach to a railroad crossing has varied in the
different states. Some courts, as Pennsylvania and Ala-
abama, have placed an absolute duty for the driver to stop,
look, and listen, and failure to do so is negligence \textit{per se}.
Other courts have placed the standard of care as an abso-
lute duty to look and listen, and failure to stop is a ques-
tion for the jury. The majority view appears to require
only such care as is exercised by a person of ordinary pru-
dence under the same or similar circumstances.\footnote{For collection of authorities of three views and a discussion of the West Virginia view see Note, 29 W. VA. L. QUAR. 274 (1923) ; Also, See Grimes v. Pa. R. Co., 289 Pa. 320, 157 Atl. 461 (1927).}

Until 1922 the West Virginia Court had imposed no duty upon the
driver to stop and had held that whether or not there was
a duty to stop was a question for the jury,\footnote{Bonar v. L. & O. R. R., 91 W. Va. 462, 113 S. E. 765 (1922).} thus correcting a misinterpretation of a prior case in which it was thought
that the court had imposed a duty to stop.\footnote{Cline v. McAdoo, 85 W. Va. 524, 102 S. E. 218 (1920).} In a later case,\footnote{Krodel v. B. & O. R. R. Co., 99 W. Va. 574, 129 S. E. 824, 828 (1925).} the
court said that "whether one has been negligent in
failing to stop is generally a question for the jury, though
in some cases the duty to do so is legal negligence." How-
ever, by "legal negligence" the court apparently meant
that it was a question for the court where there could be
but one reasonable opinion deduced from the facts. Where
the view is obstructed, the federal courts\footnote{Krodel v. B. & O. R. R. Co., 99 W. Va. 574, 129 S. E. 824, 828 (1925).} and the Kansas
court\footnote{Shatto v. Erie R. Co., 121 F. 678, 59 C. C. A. 1 (1903) ; N. Y. Centr. etc. R. Co. v. Maldment, 168 F. 21, 21 L. R. A. N. S. 794 (1909).} have followed the Pennsylvania rule. In a recent
cral court case to the effect that:

"The duty of an automobile driver approaching tracks
where there is restricted vision to stop, look, and listen
is a positive duty."\footnote{Supra, n. 7.}

Before the day of the automobile, the Pennsylvania court
held in one case that "if the traveller cannot see the track
by looking out, whether from fog or other cause, he should
\footnote{N. Y. C. R. Co. v. Maldment, cited supra, n. 8.}
get out and if necessary lead his horse and wagon," and
this view is concurred in by the Indiana court. In a more
recent case, the Pennsylvania court applied the same rule
to a driver of an automobile, saying that there was a duty,
under such circumstances, "to walk to a position where he
can have a view of the track." Other courts have held
in accord with this view. A contrary rule, however, has
been taken by at least two courts.

It is thus seen that the "significance" is not as new as
newspapers were prone to make it. What effect it will
have on state courts is to be seen. The Michigan court,
which as recently as 1925, said,

" * * * * * Prima facie, it is the duty of one approach-
ing the track to both look and listen, and, if necessary
to assure himself of safety, to stop in order to look and
listen * * * * * . 'However, obstructions to a view do
not, apparently, impose upon a driver the duty to stop
the car and go forward on foot to make observations.'

has adopted the ruling of the United States Supreme Court
in the instant case.

Whether the ruling will actually tend to promote safety
at railroad crossings is, of course, problematical. Does the
ruling lay down a standard of conduct which is followed,
as a practical matter, by the ordinary prudent driver; or,
is it only the over-cautious driver who stops at railroad
crossings? In the day of the horse-drawn vehicle, it was
good policy for the driver to stop some distance from the

---
14 Ohio, etc., R. Co. v. Thomas, supra, n. 3.
16 The Missouri Court in Woodward v. Bush, 282 Mo. 165, 226 S. W. 829 (1920),
Interpreting the Kansas rule, cited supra, n. 9, said: "Under that rule, he even
should have cut off his car if such was necessary to determine the approach of a train."
See Interpreting the same rule, Gersman v. Atchison Ry. Co., 229 S. W. 167 (Mo. 1921).
See also Andrepont v. Texas, etc., Ry. Co. & La. App. (1927), cited in American Digest,
Current Digest, October, 1921, stating "stopping, looking, and listening at railroad
crossings must be done so as to make it effective." See also Thompson v. Southern Pac.
17 Chicago R. I. & G. R. Co. v. Zumwalt, 226 S. W. 1050 (Tex. App. 1920); Flanagan v. St. Louis Ry. Co., 207 S. W. (Mo.) 463 (June 1927); "When view of
railroad track is obscured to within few feet of rail, one approaching should look and
listen until obstruction is passed * * * * * , but it is not negligence, as a matter of
law, for failing to leave conveyance and make survey." (Syllabus).
18 West v. Cleveland Terminal R. R., 229 Mich. 590, 201 N. W. 843 (1925); For other
cases on the Michigan view, prior to 1925, see: Lake Shore, etc., Co. v. Miller, 25 Mich.
19 Davis v. Pere Marquette Ry. Co., 216 N. W. 424 (Mich. 1927); Plaintiff had
stopped, looked and listened. The view at the place he stopped was obstructed. The
court said: "Plaintiff was guilty of contributory negligence as a matter of law. There
is a standard of conduct, based on the rule of reasonable care, to which all drivers of
motor vehicles must conform or bear the consequences."
tracks to prevent a possible fright to his horse, but this
danger no longer exists in the case of the automobile. As
pointed out by the West Virginia court: "An automobile
may be driven within a few feet of a passing train with-
out danger * * *. It is easily stopped and controlled,
when driven at a reasonable rate of speed."18 Obviously, it
is a choice between human lives and dollars. If we adhere
to the rule which places the question of negligence as a
problem for the jury, this may result in money verdicts
against the common carrier, because the jury may believe
that the public utility can better carry the financial loss
than the individual. If we adopt the standard of care of the
United States Supreme Court and make a failure to use
such care negligence per se, will such a requirement make
the motorist more careful and thus save human lives?
Which is the more socially desirable result?
—Mose Edwin Boiarsky.

1 TRUSTS—CHARITABLE TRUSTS OF A RELIGIOUS NATURE IN
WEST VIRGINIA.—In 1792 Virginia repealed the statute of 43
Eliz. ch. 4, which provided with the enforcement of charit-
able trusts. In 1819, the question of the validity of such
a charitable trust, created in Virginia by a citizen of that
state, came before the United States Supreme Court.1 The
court decided that such trusts were not valid at common
law, and since 43 Eliz. ch. 4, which provided for their en-
forcement, had been repealed in Virginia, the trust was
void. In 1832 the Virginia courts laid down the same rule.2
This doctrine was reaffirmed by the Virginia court in later
cases.3 In 1844, the United States Supreme Court over-
rulled its former holding with regard to charitable trusts.4
It had been discovered by that time that charitable trusts
had been enforced at common law prior to the passage of

2 Gallego's Exrs. v. Attorney General, 3 Leigh 450 (1832).
3 Hill v. Bowman, 7 Leigh 687 (1836); Brooke v. Shacklett, 13 Grat. 510; Common-
wealth v. Levey, 23 Grat. 40 (1833).