

April 1928

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

Mose E. Boiarsky, *Torts--Contributory Negligence--Stop, look, Listen--Duty to Get Out of Car*, 34 W. Va. L. Rev. (1928).

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.

² B. & O. R. R. Co. v. Goodman, 48 Sup. Ct. Rep. 24 (Nov. 1927).

around a bend between the time the driver looked and the time at which he returns and starts his automobile?³

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 Alabama, have placed an absolute duty for the driver to stop, look, and listen, and failure to do so is negligence *per se*. Other courts have placed the standard of care as an absolute duty to look and listen, and failure to stop is a question for the jury. The majority view appears to require only such care as is exercised by a person of ordinary prudence under the same or similar circumstances.⁴ 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,⁵ thus correcting a misinterpretation of a prior case in which it was thought that the court had imposed a duty to stop.⁶ In a later case,⁷ 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." However, 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 courts⁸ and the Kansas court⁹ have followed the Pennsylvania rule. In a recent case¹⁰ the West Virginia court quoted and approved a federal 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."¹¹

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

³ See dissent in *Chicago, etc. R. Co. v. Thomas*, 155 Ind. 634, 58 N. E. 1040 (1900).

⁴ 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, 137 Atl. 451 (1927).

⁵ *Bonar v. B. & O. R. R.*, 91 W. Va. 462, 113 S. E. 766 (1922).

⁶ *Cline v. McAdoo*, 85 W. Va. 524, 102 S. E. 218 (1920).

⁷ *Krodel v. B. & O. R. R. Co.*, 99 W. Va. 374, 128 S. E. 824, 828 (1925).

⁸ *Shatto v. Erie R. Co.*, 121 F. 678, 59 C. C. A. 1 (1903); *N. Y. Centr. etc. R. Co. v. Maidment*, 168 F. 21, 21 L. R. A. N. S. 794 (1909).

⁹ *Williams v. Ry. Co.*, 102 Kans. 271, 170 Pac. 398 (1918); *Bunton v. Atehison etc. Ry. Co.*, 100 Kans. 165, 168, 163 Pac. 801 (1917); *Butts v. Ry. Co.*, 94 Kans. 828, 881, 146 Pac. 1142 (1915); *Ry. Co. v. Willey*, 60 Kans. 819, 58 Pac. 472 (1899).

¹⁰ *Supra*, n. 7.

¹¹ *N. Y. C. R. Co. v. Maidment*, cited *supra*, n. 8.

get out and if necessary lead his horse and wagon,"¹² and this view is concurred in by the Indiana court.¹³ 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."¹⁴ Other courts have held in accord with this view.¹⁵ A contrary rule, however, has been taken by at least two courts.¹⁶

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 approaching 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.' "¹⁷

has adopted the ruling of the United States Supreme Court in the instant case.¹⁸

Whether the ruling will actually tend to promote safety at railway 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 railway crossings? In the day of the horse-drawn vehicle, it was good policy for the driver to stop some distance from the

¹² Pa. R. v. Beale, 73 Pa. 504 (1873).

¹³ Chic., etc., R. Co. v. Thomas, *supra*, n. 3.

¹⁴ Kinter v. Pa. R. Co., 204 Pa. 497, 54 Atl. 276 (1903).

¹⁵ The Missouri Court in Woodward v. Bush, 282 Mo. 163, 220 S. W. 839 (1920), interpreting the Kansas rule, cited *supra*, n. 3, said: "Under that rule, he even should have gotten out of his car if such was necessary to determine the approach of a train." See interpreting the same rule, German v. Atchison Ry. Co., 229 S. W. 167 (Mo. 1921). See also Andrepont v. Texas, etc., Ry. Co., 5 La. App. (1927), cited in American Digest, Current Digest, October, 1927, stating "stopping, looking, and listening at railroad crossing must be done so as to make it effective." See also Thompson v. Southern Pac. Co., 31 Cal. App. 567, 161 Pac. 21 (1917).

¹⁶ Chicago R. I., & G. R. Co. v. Zumwalt, 226 S. W. 1080 (Tex. App. 1920); Flanagan v. St. Louis Ry. Co., 297 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)

¹⁷ West v. Detroit Terminal R. R., 239 Mich. 590, 201 N. W. 955 (1925); For other cases on the Michigan view, prior to 1925, see: Lake Shore, etc., Co. v. Miller, 25 Mich. 274 (1872); Pushing v. Ry. Co., 206 Mich. 304, 172 N. W. 530 (1919); Sanford v. Ry. Co., 190 Mich. 390, 157 N. W. 38 (1916); Miller v. D. U. R., 200 Mich. 388, 166 N. W. 870 (1918); Gillett v. M. U. T. Co., 205 Mich. 410, 171 N. W. 536 (1919).

¹⁸ 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 without danger * * * . It is easily stopped and controlled, when driven at a reasonable rate of speed."¹⁹ 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.

¹⁹ *Supra*, n. 7.

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 charitable 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 enforcement, 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 overruled 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

¹ Baptist Association v. Hart's Exrs., 4 Wheat. 1 (1819).

² Gallego's Exrs. v. Attorney General, 3 Leigh 460 (1832).

³ Hill v. Bowman, 7 Leigh 657 (1836); Brooke v. Shacklett, 13 Grat. 310; Commonwealth v. Levey, 23 Grat. 40 (1893).

⁴ Vidal v. Girard's Exrs., 2 How. 127 (1844).