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Torts--Contributory Negligence--Duty to Stop, Look and Listen

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TORTS—CONTRIBUTORY NEGLIGENCE—DUTY TO STOP, LOOK AND LISTEN.—The Supreme Court of Appeals in a recent case,[1] has corrected a false impression of the rule in West Virginia regarding the care to be exercised by a traveler before attempting to cross a railroad track. The misunderstanding arose from the language used in the syllabus in the case of *Cline* v. *McAdoo*,[2] which is as follows: "As many times decided, it is the duty of a traveler on a public highway, on approaching a railroad crossing, to stop, look and listen, without which, if injured, he will be guilty of contributory negligence." This statement has led at least one trial court into error[3] and has resulted in West Virginia being classed with Pennsylvania, in a widely read text-book,[4] as holding that the duty to stop, look and listen is absolute.

In the case of *Bonar* v. *Baltimore & Ohio R. Co.*,[5] plaintiff's automobile, while crossing the tracks, was struck by defendant's engine. The defense was contributory negligence. It appeared

[1] Bonar *v.* Baltimore & O. R. R., 113 S. E. 766 (W. Va. 1922).
[2] 85 W. Va. 524, 102 S. E. 218 (1920).
[3] Bonar *v.* Baltimore & O. R., *supra*, note 1.
[4] BERRY, THE LAW OF AUTOMOBILES, 3rd ed., p. 674.
[5] *Supra*, note 1.

that plaintiff looked and listened but did not stop. The lower court instructed the jury to find for the defendant if the plaintiff did not stop, look and listen. From an order setting aside a verdict for him, plaintiff brought error. The Supreme Court of Appeals reversed the order and gave judgment for plaintiff on the verdict on the ground that the question whether the plaintiff was guilty of contributory negligence in not stopping under the circumstances was for the jury. The opinion states[6] that the West Virginia court has never held that there is an absolute duty, under any and all circumstances, for a traveler to stop, look and listen for approaching trains, "but his failure to do so is a circumstance for the jury to consider in determining the degree of care exercised by him," and that the language of the syllabus in *Cline* v. *McAdoo, supra,* is, "perhaps broader than is warranted by the facts in that case."

Out of the confusion, resulting mainly from the method of statement,[7] three distinct rules regarding the necessity of stopping, looking and listening before crossing a railroad track have emerged, under which most, if not all, of the decisions can be grouped. In two jurisdictions, Pennsylvania and Alabama, the duty to stop, look and listen is held to be absolute, and a failure to do any one is contributory negligence as a matter of law.[8] This has been qualified somewhat in Alabama[9] by holding that it is not negligence to fail to stop, look and listen if one is not in a position to do so, or if the conditions are such that one could not see or hear the approaching train by doing so. This rule has met with little favor as it is thought to put too great a restriction upon the privilege of the public in using the highways.[10] The court of no other state has seen fit to require the traveler to stop under all circumstances, although some have imposed this duty where the view is obstructed,[11] and this seems to be the rule of the Federal Courts.[12]

Under the second rule, the failure to stop is not absolute, but a failure to look and listen is negligence *per se.*[13] The duty to stop

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[6] *Ibid,* at page 767.
[7] Stearns *v.* Boston & R. Co., 75 N. H. 40, 71 Atl. 21, 21 Ann. Cas. 1166 (1908).
[8] Aiken *v.* Pennsylvania R. Co., 130 Pa. 380, 18 Atl. 619, 17 Am. St. Rep. 775 (1889); Benner *v.* Philadelphia & R. R. Co., 267 Pa. 307, 105 Atl. 283 (1918); Atlantic Coast Line R. R. *v.* Jones, 202 Ala. 222, 80 So. 44 (1918); Hines, Director General *v.* Cooper, 204 Ala. 535, 86 So. 396 (1920).
[9] Georgia Cent. R. Co. *v.* Hyatt, 151 Ala. 355, 43 So. 867 (1907).
[10] See 21 COL. L. REV. 291.
[11] Chase *v.* Maine Cent. Ry., 167 Mass. 383, 45 N. E. 911 (1897).
[12] Shatto *v.* Erie R. Co. 121 Fed. 678, 59 C. C. A. 1 (1903).
[13] Little Rock & R. Co. *v.* Blewitt, 65 Ark. 235, 45 S. W. 548 (1898); Castle *v.* Director General of Railroads, 232 N. Y. 430, 134 N. E. 334 (1922).

is a relative one, depending upon the facts of the particular case, the knowledge the traveler has of the situation and the reliance he may reasonably place on his opportunities for seeing and hearing without taking the precaution of stopping, and the determination of its necessity is left to the jury. This rule also prescribes a quantum of care, but is more reasonable in its requirements and conforms more closely to the conduct of the average traveler.

The third rule requires only such care as is exercised by a person of ordinary prudence under the same or similar circumstances.[14] The question of the necessity for looking and listening as well as stopping, is to be left to the jury unless the facts and circumstances are such as to justify the direction of a verdict. This would seem to be the soundest of the three rules and represents the view of a majority of our courts.[15] That it is open to abuse by juries is true,[16] but this can be prevented to a great extent by the courts if they are not too backward in directing verdicts.

While the West Virginia Court has negatived plainly an adherence to the first of these rules,[17] it has not so clearly indicated which of the other two it would follow. It quotes with approval[18] the rule laid down in *City of Elkins* v. *Western Maryland R. Co.*,[19] which says: "It is not negligence *per se* in all cases for travelers upon a public street or road, on approaching a railroad crossing, not to stop, as well as to look and listen, before attempting to cross the track. Whether one has been negligent in failing to stop is generally presented as a mixed question of law and fact, to be submited to the jury, and not as one of law, for the judgment of the court." While this would indicate that the only question for the jury was whether plaintiff was negligent in failing to stop, the court also says[20] "but the opinion in that case (*Cline* v. *McAdoo*) shows that other facts and circumstances may be shown so as to excuse the plaintiff from stopping, looking and listening, or at least such as will carry the case to the jury on whether the plaintiff did or did not act under the circumstances as a reasonable and prudent man would have done; in other words whether plaintiff was guilty of contributing negligence is a question for

[14] Texas & N. O. R. R. *v.* Harrington, 234 S. W. 188 (Texas 1921).
[15] Loughman *v.* Hines, 117 Wash. 166, 200 Pac. 1086 (1921); Murden *v.* Va. R. & W. Power Co., 130 Va. 449, 107 S. E. 660 (1921); and numerous cases cited in note in 1 A. L. R. 203.
[16] See 21 COL. L. REV. 291.
[17] Bonar *v.* Baltimore & O. R. R., *supra,* note 1 at page 767.
[18] *Ibid.*
[19] 76 W. Va. 733, 88 S. E. 762, 1 A. L. R. 198 (1915).
[20] Bonar *v.* Baltimore & O. R. R. *supra,* note 1 at page 767.

the jury." From this it would appear that the jury is expected not only to pass on the question of the necessity for stopping, but also to decide whether under the circumstances, a failure to look and listen was negligence. It would be helpful to the courts and to the profession if the extent of the jury's participation in these cases were more clearly defined.

—E. C. D.