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Mary L. Casanave

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EVOLUTION OF THE STOP, LOOK AND LISTEN RULE IN PENNSYLVANIA

"Courts frequently define the standard of self-protective care to which a plaintiff must conform to a degree of particularity to which they rarely define the standard to which a defendant must conform." In Pennsylvania there is no better example of the above statement than the well known "stop, look and listen" rule.

The situation is this. A motorist approaches the grade crossing of a railroad. Both the motorist and the engineer have the duty to avoid a collision. An accident occurs. The motorist sues the railroad. If the motorist failed to conform to the standard of a reasonably prudent motorist he is contributorily negligent and will be precluded from recovery in the suit against the railroad even though the engineer was negligent. Is the court or the jury to say, under the facts and circumstances, whether the plaintiff used the care that a reasonably prudent motorist would? In this type of case the courts of Pennsylvania have established a standard of care to which the plaintiff must conform and have applied it vigorously for nearly a century. The legal duty of anyone crossing a railroad track is to stop, look and listen, and failure to perform the duty under any circumstances is negligence per se. There is no necessity to submit the case to the jury for in the eyes of the law that is the care a reasonably prudent man would use to avoid collision with a railroad train.

The stop, look and listen rule will be applied as a matter of law:

1. Where the plaintiff admits he did not stop, look or listen;
2. Where it is clear from his testimony that he did not do so; or
3. Where the evidence is such that, even if there is testimony that the plaintiff performed his duty, the physical facts show that he must have seen an approaching train if he had done what the law requires.

Whether failure to stop, look and listen is negligence per se is never squarely presented in the modern cases. The plaintiff has always stopped, looked and listened. The issues on appeal are: (1) whether the facts are sufficiently incontrovertible so that verdict may be properly directed; or, (2) whether the plaintiff stopped, looked and listened at the proper place, which is a question for the court or the jury under the given circumstances. Nevertheless, the Supreme Court frequently reasserts the doctrine as dictum, saying as it recently did:

"The unbending rule as to the duty of a traveler on a public highway, as he approaches a railroad crossing over it, is to stop, look and listen."

1 Restatement, Torts § 476, comment (a).
2 349 Pa. 123, 30 A.2d 644 (1944). The majority opinion illustrates the particularity with which the court will define a law where the plaintiff has the duty to stop. This corollary rule is becoming as harsh as the original from which it sprang. Two judges dissented, saying this issue was properly for the jury.
but actually holding that it was proper for the lower court to decide as a matter of law that the plaintiff did not stop at the proper place.

The rule originally developed many years ago, when trains were an awesome new invention and a vastly improved means of transportation. The first case in 1858 to consider the respective duties is the quaint old case of *Reeves v. The Delaware, Lackawanna and Western Railroad Co.*, where a drover is suing for the loss of his cattle. The plaintiff had 300 cows to drive across a railroad track. He knew the train was momentarily expected but nevertheless proceeded to drive his herd across. The cattle were upon the track; the train approached; they met. Who was negligent? The drover in failing to wait until the train had passed, or the engineer in failing to slow down. The court says of the drover:

"He was bound to use reasonable care. The unquestionableness of his right of transit did not release him from the obligation of that degree of diligence and prudence which men in his situation ordinarily exercise."

Of the engineer:

"It is said that the engineer did not see the cattle upon the track, and could not look, because he had to keep his eye on the track. But that was because he was going too fast. Dashing forward with such Jehu speed as to be unable to see a drove of cattle half a mile long, was a very rash mode of approaching the crossing of a great public thoroughfare, which must be approached on a curve, and after issuing from a cut that would more or less obstruct his view."

The court then held that it was for the jury to decide whether the drover in this case "to avoid collision did all that prudent men in general would do in his situation," but went on to add these words which were to become the substantial basis of the rule:

"The traveler has the obligation of prudence upon him. He is bound to stop and lookout for trains, and may not rush heedlessly, nor remain unnecessarily on a spot over which the law allows engines of fearful power to be propelled by one of the most resistless agents of nature."

In the next case, *Pennsylvania Railroad Company v. Ogier*, it was not questioned that the traveler had the duty to stop and look out, but whether under the circumstances, the deceased had performed his full duty to be free of contributory negligence. Had the deceased stopped his horse and buggy 10 feet from the track he could have seen 623 feet eastward and the approaching train; had he stopped 18 feet from the railroad he could have seen 352 feet; but where Dr. Ogier stopped was 84 feet from the track at the top of a hill approaching the grade where it was customary for travelers to stop since they could not again see the tracks until they were within 18 feet, which, it was testified, could not be

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8 6 Casey 454 (Pa. 1858).
4 11 Casey 60 (Pa. 1860).
safely done because the horses might become frightened. In theory, if the doctor had stopped 10 feet from the track, this particular train would have been only 174 feet away and the one in danger had only 17 seconds within which to act. Under these circumstances, whether the doctor had acted as a prudent man was a question for the jury.

Then followed the case of a pedestrian who had crossed the railroad tracks without stopping and was killed before he reached the other side. His widow recovered. Although the lower court had refused the defendant railroad's point for charge that it was the duty of the deceased to stop, the judge's refusal was not assigned as error on appeal. The Supreme Court, after saying that the verdict was scarcely justifiable on the evidence, could not reverse the lower court on the points assigned as error.

In the following year, in North Pennsylvania Railroad Co. v. Heileman, the court first held that failure to look was negligence per se. On a rainy morning the plaintiff, who was driving a covered wagon with the curtains closed, was struck while crossing a railroad grade. The evidence was uncontradicted that he failed to look out and the question of his contributory negligence was submitted to the jury, with the charge that his failure to look was evidence of negligence. The Supreme Court cited the Reeves case quoting the phrase "he is bound to stop and look out" which is actually not what the case held, to support its decision. Then it reversed the lower court for the error of submitting the case to the jury saying, "When the standard is fixed, and where the measure of duty is defined by the law, entire omission to perform it is negligence." The court justified its decision with the reason that the "movement of trains is so speedy and the results of the collision so disastrous."

Then came the case of Hanover Railroad Co. v. Coyle which introduced the plaintiff who was "muffled up with his coat, comfort and buffalo rug" and the third requirement, namely, to listen. Although the plaintiff recovered since the case was submitted to the jury on the controverted evidence of whether Coyle had stopped, looked and listened, and the defendant's remedy for the alleged improper verdict was a new trial, not a writ of error, the Supreme Court approved the lower court's charge defining the well known standard of care required of every plaintiff in grade crossing accidents.

"It was the duty of the plaintiff . . . to have stopped his wagon; . . . to have listened to hear the whistle or the noise of the engine and cars, and to look to see if an engine or train was coming."

In Pennsylvania Railroad Co. v. Beale, the Supreme Court with two of the five judges dissenting, flatly held that failure to stop was negligence per se. The

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5 47 Pa. 244 (1864).
6 49 Pa. 60 (1865).
7 55 Pa. 396 (1867).
8 73 Pa. 504 (1873).
facts were these: A widow was suing for the death of her husband; the plaintiff admitted that the deceased did not stop before crossing the track because had he stopped, as other evidence verified, he could not have seen. The lower court submitted the case to the jury charging:

"While the law is fixed and settled, that it is the duty of the traveler to stop, look and listen before he goes upon a track, yet we do not understand the rule to be of such universal application as to control a case where stopping, looking and listening would have been in vain. The law does not demand vain and impossible things. Cases of this kind must necessarily rest upon the peculiar facts and circumstances."

The Supreme Court answered:

"There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track, is not merely evidence of negligence for the jury but negligence per se, and a question for the court. (citing the Heileman case) . . . Therefore, in every case of collision the rule must be an unbending one. It is important not so much to railroad companies as to the traveling public. Collisions of this character have often resulted in the loss of hundreds of valuable lives, of passengers on trains, and they will continue to do so again, if the travelers crossing railroads are not taught their simple duty, not to themselves only but to others."

Thus, with the Beale case, what the law expected of the plaintiff in grade crossing litigation was established.

To summarize the holdings of the above formative cases discloses:

1. The Reeves case held the standard of care the plaintiff was to exercise was a question for the jury.

2. The Heileman case held that failure to look was negligence per se citing the Reeves case to support this proposition.

3. The Beale case held failure to stop was negligence per se using the Heileman case to support this proposition.

4. No case has squarely held that failure to listen is negligence per se.

The courts, having established well before 1900 what the rule was, then had to protect it against any modifications, which they have successfully done, for the rule is still as strict and unbending today. To combat the possibility of testimony of the plaintiff taking the case to the jury, the incontrovertible physical facts rule was developed. This means that if the plaintiff testifies that he stopped, looked and listened, but evidence shows that had he actually done as he said, the collision would have been avoided, the verdict will be directed for the defendant.

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Nor will the law permit any excuse or justification for non-performance, such as absence of a warning sign, or of a raised safety gate, or the plaintiff's ignorance of the country and the existence of the crossing, or the fact that a railroad siding is a private one, or that it was in a city or town rather than the open country, or that his horse was frightened and he could not be controlled. These and many other distinctions and exceptions have been raised in the hundred years of the rule's existence but to no avail. In the language of the court:

"The rule to stop, look and listen is not a rule of evidence but a rule of law peremptory, absolute, and unbending, and the jury can never be permitted to ignore it, to evade it, or to pare it away by distinction and exception."

From a rule that was first applied to cows it has been extended to bicycles, to pedestrians, to fire engines, to hose carts and ambulances, and to automobiles. In one novel case, the deceased was riding a bicycle when he came to the tracks. He did not dismount but circled on his wheel several times at a distance of four or five feet from the tracks. When he crossed he was struck. Was this a "stop"? The Court answered this very clearly:

"It was the duty of the deceased to stop and dismount in order to make his stop effective, for the purposes of looking and listening. The real contention of the appellant is embodied in the proposition that the circling round and round constituted a legal as well as a 'bicycler's' stop. No such proposition can be entertained."

The United States Supreme Court case of *Baltimore and Ohio Railroad Co. v. Goodman* was often used in Pennsylvania to support its law, since Judge Holmes defined the standard of care as follows:

"It seems to us that if a driver cannot be sure otherwise whether 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."

However, this case was later limited by *Pokora v. Wabash Ry. Co.* in which it was held that the standard of care which the plaintiff was to use was a question for the jury.

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10 207 Pa. 306, 113 A. 370 (1921).
11 276 Pa. 508, 120 A. 449 (1923).
12 225 Pa. 528, 74 A. 373 (1909).
14 124 Pa. 572, 17 A. 188 (1889). This is a distinction made in street railway cases applying the stop, look and listen rule.
15 221 Pa. 350, 70 A. 852 (1908).
17 180 Pa. 43, 36 A. 405 (1897).
18 130 Pa. 38, 18 A. 600 (1889).
19 215 Pa. 113, 64 A. 323 (1906).
20 108 Pa. 349 (1885).
21 246 Pa. 367, 92 A. 340 (1914).
22 180 Pa. 429, 36 A. 923 (1897).
The only case this writer could discover in which the stop, look and listen rule was criticized was the dissenting opinion of Mr. Justice Simpson, in which Mr. Justice Stewart joined, in *Benner v. Philadelphia and Reading Railroad Co.* The dissent inquired into the reason for the rule, and the propriety of a court foreclosing the rights of future unheard litigants, by a harsh, arbitrary and unbending rule, without legislative action. While they doubted the wisdom of the rule, they felt that *stare decisis* compelled their adherence to it, yet they would be in favor of modifying it to conform to reasonable requirements.

After nearly a hundred years of steadfast adherence to the rule that failure to stop, look and listen is negligence per se, the following are some of the reasons that can be advanced as to why such conduct should be evidence of negligence and the question of the standard of care required of the plaintiff be submitted to the jury under the given facts and circumstances of a particular case.

1. Historically, the standard of care was originally a jury question.
2. If the plaintiff survives, the rule is conducive to perjury.
3. If the traveler is killed, his survivor often gains the procedural advantage of having the case submitted to the jury on the presumption that the deceased used due care.
4. The weight of judicial authority, including the United States Supreme Court, is to the contrary.
5. The Vehicle Code requires no such duty of the average motorist in the absence of plainly visible signs requiring him to stop, such as lights or flagmen.
6. The justification for the rule is no longer valid, that is "the movement of trains is so speedy and the results of a collision so disastrous." This is particularly true as to sidings and infrequently used spur lines.
7. The great technological development of motor transportation that was unknown at the time that the rule was developed for the horse and buggy in the 1860's. The law was originally formulated at a time when railroads crossed infrequently used highways and the speed of trains was superior to any other type of conveyance. Moreover, the increased number of motorists on the highway should mean the increased protection for the motorist if the justification is to protect the traveling public.
8. The rule does not describe the realities of the present day conditions. This harsh, arbitrary, and unbending rule of law does not reflect the standard of care used by the reasonably prudent man as every motorist well knows.

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26 266 Pa. 307, 105 A. 283 (1918).
26 Act of May 1, 1929, P. L. 905, Article X, § 1003, 75 P. S. 502 (Pa.).
27 See note 6, supra.
When the law requires unreasonable and vain acts from men they will not con-
form. As Mr. Justice Simpson so frankly said in the Benner case:

"Everyone, even all those who adopted and those who enforce the rule of 'stop, look and listen' in all human probability would have acted just as the plaintiff's husband did."

Or in the words of Judge Cardozo in the Pokara case:

"(there is a) need for caution in framing standards of behavior that amount to rules of law. The need is more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of the jury."

Mary L. Casanave

28 See note 25, supra.
29 See note 24, supra.