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EVOLUTION OF THE STOP, LOOK AND LISTEN DOCTRINE IN NEW JERSEY

"When a man goes upon a railroad track, he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train for him. In such circumstances, 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 to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk." Mr. Justice Holmes in *Baltimore and Ohio Railroad Co. v. Goodman*, 275 U. S. 66, 48 Sup. Ct. 24, 56 A. L. R. 645 (1928).

This is the stop, look and listen rule as laid down by our federal courts and this is also the law in Pennsylvania.¹ But is this the law of New Jersey? If not, how close do the New Jersey courts come to following this rule?

In the early case of *Moore v. Central Railroad Co.*, 4 Zabriskie 268 (N. J. 1854), it appears that we have the first case from which the rule (as it may be applied in New Jersey) evolved. This case involved an action for injuries received by the plaintiff, who was a stage coach driver, when he was struck by the railroad cars of the defendant while driving his stage upon a public turnpike. This turnpike was crossed by the railroad tracks of the defendant. *Held*, that the plaintiff cannot recover if it appears that the want of ordinary care or prudence on his part contributed to the injury.

In a full report by Ogden, J., after close examination of the English cases therein cited, it was said, "In 10 Meeson and Welsby 546, *Davies v. Mann*, called the *donkey* case, the court said, 'Negligence of a plaintiff, to prevent a recovery, must be such as that he could by ordinary care have avoided the consequences of the defendant's negligence. If by ordinary care he could have avoided them, he cannot recover.'" Judge Ogden goes on further to say, "The plaintiff was traveling upon a turnpike road established by legislative enactment. The Central Railroad Company derived power from the same source to cross the turnpike with railroad track. They are also authorized to run their trains unrestricted as to motive, power, speed or time. The fact is notorious throughout the country, that the public exigencies of travel and mail transportation demand and require from railroad companies the running of fast trains. The great desideratum with the passengers is speed, and so pervading is its influence that no restraint has, as yet, been put by law upon the rapidity with which public ordinary roads may be crossed."

From this case, the rule under consideration began in the form of an imposition upon travelers of the highways² as a means by which any hindrance to our

¹ North Pennsylvania Railroad Co. v. Heileman, 49 Pa. 60, 88 Am. Dec. 482 (1865).

² Pennsylvania Railroad Co. v. Righter, 42 N. J. L. 185 (1880).

growing railroads, in the form of lawsuits, was alleviated. Here there were two equal positions to consider; both parties had the right to be where they were, at the same time. Thus the important question evolved, who was to have the superior right? The court took the position that as against the individual, the mushrooming railroad was to predominate, for it was felt that the development of railroads and the extension of our systems of travel and communication were of the highest priority in the economic growth of our country.

In a concurring opinion in the *Moore* case, *supra*, Potts, J., said, "In this age, so prolific of change, when railroads have come to occupy all our great lines of travel, coursing through our cities and villages . . . courts are called on to exert all the power they possess in guarding the public from the danger incident to negligence in their (the trains) use." (Parenthetical matter supplied).

This is an honest and frank admission that the public need be safeguarded, and as regards the equal rights granted to both the public and the railroad at crossings, that the railroad is given the preferential rights. However, after admitting the pressing need for protection of the public, Potts, J., goes on to say, "The whole subject will probably at some distant day, imperiously demand the interposition of legislative regulation, but until this is done we can only apply to the cases of negligence the settled rules of existing law. . . We sit here not to make but to administer the law and we must do so by the existing rules."

The existing rules to which Judge Potts referred were those which governed the cases of ordinary negligence and which were at this time embedded in the English common law. It was from these rules that the law governing railroads grew in this country. It is interesting to note that at this time there was no definite requirement that one must resort to stop, look and listen as a standard of care for the traveller, but rather the court used the words "ordinary care" as describing the conduct required of the general public. From the freedom which was granted to the railroad as far as their standard of care was concerned, the traveler was required to use "such caution that is commensurate with the probabilities of danger."³

The case of *Runyon v. The Central Railroad Company of New Jersey*, 1 Dutcher 556 (N. J. 1856), is the first indication that from the standard of care described by Judge Ogden in the *Moore* case, *supra*, was to evolve the rule under consideration.

This was an action brought by the plaintiff for damages occasioned by a collision with a train of cars of the defendant railroad. It was held that if by the exercise of ordinary skill and care the plaintiff could have avoided the injury, or if his conduct contributed to produce it, he could not recover. Judge Potts said, "But besides this, persons approaching a crossing in vehicles of their own must use their *eyes* and *ears* and exercise common care and prudence to avoid a collision,

³ Potts, J., in *Runyon v. The Central Railroad Company of New Jersey*, 1 Dutcher 556 (1856).

commensurate with the danger or they are no less reprehensible." (Italics supplied). Although the actual words "look" and "listen" were not used *per se*, it can be seen that this language would soon evolve into a definite rule.

In 1868 the word "look" became a part of the doctrine. It was held that a traveler upon the highway who fails to "look" for an approaching train is guilty of negligence and cannot recover for injuries received in a collision with a passing train.⁴

In 1880 the word "look" was added to the word "listen". In *Pennsylvania Railroad v. Righter*,⁵ it was said: "A primary rule of legal caution is that a person about to cross a railroad is bound to use his eyes and ears, to watch for sign boards and to *listen* for a bell or a whistle and to guard against the approach of a train by looking each way before crossing." (Italics supplied).

It was not until seven years later that the word "stop" came in the doctrine. In *Merkle v. The New York, Lake Erie and Western Railroad Company*, 49 N. J. L. 473 (1887), it was said, "Inasmuch as he (plaintiff) could not see an approaching train at any considerable distance from the track, ordinary prudence required him to *stop* when he was near enough to the railroad to ascertain, at least by listening, whether there was danger or not." (Italics and parenthetical matter supplied).

It is true that the word "stop" was finally added to the doctrine, but the word was not used in the strict sense as applied in the federal and Pennsylvania courts. For in Pennsylvania⁶ and the federal courts⁷ failure to stop, look and listen is negligence *per se*. All three acts, that of stopping, looking and listening, require separate performance. Each is a singular distinct act. In New Jersey, however, a person is required to stop only if he cannot look and listen without stopping. This, therefore, makes the act of stopping a condition subsequent, its performance dependent upon the ability of the traveler to first look and listen. If the traveler can look and listen, then stopping is not required of him. The rule was further reiterated in *Passman v. West Jersey and Seashore Railroad Co.*, 68 N. J. L. 719, 54 A. 809 (1903), where it was said that, "It is necessary to look and listen and if it is necessary to stop in order to make the looking and listening effective, the neglect to stop will bar the right of action of the person to whom injury so results."

The law until this time developed with what it seems was a constant placing of burdens upon the traveler. The attitude of the courts seemed to be one of confining the traveler to narrow limits in the exercise of ordinary care. They had established rules, and any infraction of these limiting rules would automatically make the traveler contributorily negligent and bar his right to recover. In 1909 however, the New Jersey Legislature passed the Statute Act of April 4, 1909. This Act was perhaps an indication that the cause of the traveler was being aided by the

⁴ *Haslan v. Morris & Essen Railroad Co.*, 33 N. J. L. 147 (1868).

⁵ *Pennsylvania Railroad Co. v. Righter*, 42 N. J. L. 185 (1880).

⁶ *Decker v. Lehigh Valley Railroad Co.*, 181 Pa. 465, 37 A. 570 (1894).

legislature. This Act stated, "In any action brought for injuries to person or property or for death caused at any crossing protected as aforesaid, (the statute supplies the manner in which crossings should be protected) no plaintiff shall be barred of the action because of the failure of the person injured or killed to stop, look and listen before passing over the crossing."

In effect then, the legislature has by statute placed upon the railroad an absolute liability, if the situation falls within the limits as prescribed by the statute. "Such a condition of things, under the statute referred to, absolved the plaintiff's intestate from stopping, looking and listening."⁸ This Act was further upheld in *Hatch v. Erie Railroad Co.*, 88 N. J. L. 545, 97 A. 38 (1916), where it was held that a plaintiff entering a highway crossing upon the rising of safety gates, who was struck by a train, was not negligent for failure to look and listen.

For a brief period, it appeared as though the care required of both railroad and traveler were to be equalized. However, in 1928, the New Jersey court extended the rule once again. This time it approached the adoption of the federal stop, look and listen rule but fell short of doing so. In an opinion by Lloyd, J., in *Stryker v. Pennsylvania Railroad Co.*, 140 A. 451 (1928), it was there held, quoting in part Justice Holmes,⁹ "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows he must stop for the train, not the train stop for him."

After quoting Justice Holmes, the conclusion would be drawn that the court is to adopt the views so quoted, but this was not the case. After a brief summation of the facts, Judge Lloyd goes on to say not that it was the absolute duty of the traveler to stop but that he should have controlled his car in such a manner as to avoid a collision.

In conclusion, the care which the law of New Jersey requires of the traveler on the highway, where the highway and the tracks of a railroad cross, is one not of stop, look and listen, but rather a rule of effective observation.

"The rule of effective observation as defined in *Conkling v. Erie Railroad Co.*, 63 N. J. L. 338, 43 A. 666 (1899), is namely—the duty of the traveler on the highway does not stop with looking and listening, but he must exercise care to select a position from which an effective observation can be made, and he must exercise care to make the act of looking and listening reasonably effective."¹⁰

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⁷ *Baltimore & Ohio Railroad Co. v. Goodman*, 275 U. S. 66, 48 Sup. Ct. 24 (1928).

⁸ *Fernetti v. West Jersey and S. R. Co.*, 87 N. J. L. 268, 93 A. 576 (1911).

⁹ *Goodman case*, note 7, supra.

¹⁰ *Burling, J.*, in *Grosso v. Pennsylvania, Reading Seashore Line*, 23 N. J. Misc. 188, 42 A.2d 778 (1945).