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O'Brien v. Great No. Ry., 400 P.2d 634 (Mont. 1965)

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RECENT DECISIONS

THE STANDARD OF CARE OF A VEHICLE OPERATOR CROSSING RAILROAD TRACKS, CONTRIBUTORY NEGLIGENCE AND ITS EFFECTS.—The car driven by the plaintiff's decedent crashed into the front of the defendant's engine as it was proceeding slowly over a grade crossing. Plaintiffs brought an action based on negligence. The railroad defended on the basis of the contributory negligence of the deceased. The jury returned a verdict of $170,000 for the plaintiffs. On appeal to the Montana Supreme Court, *held,* reversed. The jury should have been instructed as requested by defendant: "That railway tracks and highway signs that indicate the presence of railroad crossing are themselves warnings of danger, and if you find from the evidence that . . . [the deceased] failed to look and listen for approaching trains, and to stop before driving onto the tracks, if this was necessary to make his looking and listening for approaching trains effective, he was guilty of negligence which contributed to his injury, and your verdict must be in favor of the defendants."[1] *O'Brien v. Great No. Ry.,* 400 P.2d 634 (Mont. 1965).

Negligence has been defined as "conduct . . . which falls below the standard established by law for the protection of others against unreasonable risk of harm."[2] "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, co-operating with the negligence of the defendant in bringing about the plaintiff's harm."[3] In both theories the conduct is compared to that of a reasonably prudent man similarly situated. The duty or standard is a function of the likelihood of harm and the seriousness of the injury should the harm be incurred, weighed against the value of the interest which must be sacrificed to avoid the danger. The question of negligence or contributory negligence is generally for the jury. But where reasonable minds could not differ or where statutes prescribe the duty, it is a matter of law to be laid down by the courts.[4] To have a positive effect in an action, the negligence or contributory negligence must be a proximate cause of the injury sustained.

As a general rule, contributory negligence operates as a complete defense in a personal injury action.[5] The plaintiff's conduct under the

[1]Error also occurred in the admission of the testimony of plaintiffs' witness, the highway patrolman who investigated the accident. He was not familiar with stopping distances in terms of speed. He expressed doubts about his ability to judge conclusively. Moreover, due to the impact there was no way to determine the speed of the vehicle from the skid marks of 66½ feet on the highway. This witness testified that in his opinion, the decedent was not exceeding the speed limit. As he was testifying as an expert witness and the jury might have accorded the testimony considerable weight it was held prejudicial.

[2]RESTATEMENT, TORTS § 282 (1934).

[3]*Id.* at § 463.

[4]*Id.* at § 285.

[5]*Id.* at § 467.

circumstances of the particular case does not conform to the standard required for his own protection. He is, therefore, denied the recovery to which the negligence of the defendant would otherwise have entitled him. An example of the operation of this rule is found in an 1809 English case, cited as the first contributory negligence decision.[6] The defendant had negligently placed a pole across a road, and the plaintiff, "who was riding violently," rode against it, fell with his horse, and was severely injured. It was said that if the plaintiff "had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault. One person being in fault will not dispense with another's using ordinary care for himself."[7]

Recognition of the inherent dangers involved in railway crossings led to the adoption of specific standards of conduct which travelers using the crossings were bound to follow. One such standard was laid down by the Pennsylvania court in adopting the so called stop-look-and-listen rule:

> At the place of intersection there are concurrent rights. Neither the traveler on the common highway nor the railroad company has an exclusive right of passage. Even on a common road, travellers must look out for the approach of other vehicles passing. And this is more necessary at a railroad crossing, because the movement upon such a road is more speedy, and because the consequences of a collision are usually so disastrous. Precaution, looking out for danger, is therefor a duty. . . . "The traveller has the obligation of prudence upon him; he is bound to stop and look out for trains. . . .[8]

This duty to stop was imposed by law. Therefore, the failure to do so was not merely evidence of negligence, but was negligence per se.[9]

In *Balitmore & O. R. R. v. Goodman,*[10] Mr. Justice Holmes imposed the strictest standard of conduct required of travelers at grade crossings. He stated that the driver must stop, and get out of his vehicle if necessary to determine whether a train was dangerously near. He applied his philosophy that "when the standard is clear, it should be laid down once for all by the Court."[11] Seven years later Mr. Justice Cardozo rejected that fixed standard, envisioning the possibility of catastrophic results of requiring the driver to leave his vehicle.

> Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal. In default of the guide of customary conduct, what is

[6]Butterfield v. Forrester, 11 East. 59, 103 Eng. Rep. 926 (1809).
[7]*Id.* at 927.
[8]North Pa. R.R. v. Heileman, 49 Pa. 60, 64 (1865).
[9]Pennsylvania R.R. v. Aiken, 130 Pa. 330, 18 Atl. 619 (1889).
[10]275 U.S. 66 (1927).
[11]*Id.* at 70.

suitable for the traveler caught in the mesh where the ordinary safeguards fail him is for the judgment of the jury.[12]

There are really two phases to this problem; the determination of the standard of care required of the traveler from the existence of the crossing, and the application of that standard to the traveler's conduct. In the instant case, the deceased's conduct under the circumstances was not such as to constitute, as a matter of law, contributory negligence. He could not be held to a standard of care required by facts and circumstances of which he was not aware.[13] Thus, the court in the instant case determined that the instruction setting forth the standard of care should have been given. The question of the deceased's conduct in relation to that standard was a question of fact for the jury.

The rules which formulate the standard of care required at grade crossings in Montana were summarized by the Montana Supreme Court in the instant case:

> The presence of a railroad track is of itself a warning of danger; a person approaching a railroad crossing is required to take all reasonable precautions to assure himself by actual observation that there is no danger from an approaching train; the failure of the persons in charge of the train to give warning signal of its approach to the crossing does not relieve the traveler of the necessity of making vigilant use of his senses to ascertain whether it is safe to proceed; the traveler must use ordinary care to make his looking and listening reasonably effective. It may also be said that whenever it appears that there is a zone of safety within which a traveler upon a highway, may by looking or listening and stopping to do so if need be, ascertain the presence of an oncoming train, it is his duty to make his observation within such zone. If he proceeds from the place of safety regardless of an approaching train of which he has knowledge, or if he leaves the place of safety without having made vigilant use of his senses to discover a danger which is present and could have been seen from such place, then it will be held to be his negligence which is the proximate cause of an injury resulting from a collision regardless of circumstances tending to show negligence on the part of the railroad operators.[14]

[12]Pokora v. Wabash Ry., 292 U.S. 98, 105 (1934).

[13]This is true if his failure to comprehend the situation was not through his fault, but resulted from the neglect of a duty imposed on, or assumed by the railroad. In the instant case, the duty of the railroad to station a flagman at the crossing was admitted by the pleadings although it seems the imposition of this duty was otherwise open to question. Instant case at 640.

[14]Instant case at 641, quoting from an earlier decision, Roberts v. Chicago, M. & St. P. Ry., 67 Mont. 472, 479, 216 Pac. 332, 334 (1923). In saying that "it will be held to be his negligence which is the proximate cause of an injury. . . ." the Court seems to be treating proximate cause as the basis for contributory negligence. As will be discussed later, the contributory ngligence involved does not meet the normally accepted requirements of a superseding cause.

Montana imposes a statutory duty on travelers to stop when a train approaching a highway crossing gives an audible signal and the train, by reason of its speed or nearness to the crossing is an immediate hazard.[15] Moreover, where the crossing is outside the limits of an incorporated city or town and a flagman or mechanical warning device is not maintained, if the view is obstructed or an approaching train is within sight or hearing, then travelers must stop before crossing the tracks.[16] Although a statute requires the use of whistles and bells at grade crossings[17] and even though the public has a right to rely on such signals, the failure of the railroad to give them does not excuse a citizen from using at least ordinary diligence and prudence:

> [I]f one, upon approaching a railroad crossing, intending to pass over it, fails to make a vigilant use of his senses,—that is, to look or listen, and to stop for this purpose, if necessary, to learn if there is danger,—and by reason of this failure to exercise this precaution he is injured, then he contributes directly to such injury, and cannot be heard to say that the railroad company did him the injury. . . .[18]

If the situation is such that if the driver had used his senses he could not have failed to have seen or heard the approaching train at a point where he was in perfect safety, his failure to so exercise his senses amounts to negligence.[19] This negligence, although not the sole cause of the accident, as a matter of law bars recovery.[20] If the facts and circumstances shown by the evidence of the plaintiff's own case are such as to raise a presumption that he was not at the time in the exercise of due care, he will have the burden of going forward with the evidence on the point. If he fails to introduce evidence to remove this presumption he is properly non-suited.[21]

If the railroad fails to give the warnings prescribed by statute, and this negligence is a proximate cause of the injury, the contributory negligence of the driver nevertheless operates as a total bar to recovery.[22]

[15]REVISED CODES OF MONTANA, 1947, § 32-2191. (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.)

[16]R.C.M. 1947, § 72-164.

[17]R.C.M. 1947, § 72-219.

[18]Hunter v. Montana Cent. Ry., 22 Mont. 525, 57 Pac. 140, 142 (1899). Again in this quotation, the language used by the Court seems to indicate the improper use of proximate cause as a basis for contributory negligence.

[19]Monforton v. Northern Pac. Ry., 138 Mont. 191, 355 P.2d 501, 506 (1960). In this case, the road was level and it was a clear day with good visibility. The driver had an unobstructed view of the tracks and if he had looked the train would have been visible to him for about a mile prior to the collision.

[20]Great No. Ry. v. Taulbee, 92 F.2d 20 (9th Cir. 1937).

[21]Rau v. Northern Pac. Ry., 87 Mont. 521, 289 Pac. 580 (1930). In this case, the deceased started across the tracks after the passage of one train, and was struck by a second coming in the opposite direction on the track beyond.

[22]R.C.M. 1947, § 72-219.

This is true regardless of the relative deviations from the respctive standards of care. However, the language of the courts in many of the grade crossing cases indicates that the courts fail to differentiate between the theories of intervening cause and contributory negligence. Contributory negligence is somewhat analogous to the situation of joint tort-feasors, where the negligence of both actors is the proximate cause of the injury.[23] On the other hand, where the intervening cause is present, it serves to break the causal chain between the negligence of one of the parties and the injury. It generally contemplates a subsequent action by a third person or a natural occurrence not arising or forseeable from the actor's negligence.[24] The crossing accident is the normally forseeable consequence involved in the railroad's failure to give adequate warnings. The traveler approaching the crossing is the very focus of this duty. The negligence of the traveler in failing to observe the approaching train concurs with rather than supersedes the negligence of the railroad in failing to give the warning. Thus the negligence of both are substantial factors in bringing about the resulting damage.

Three factors have been influential in the development of the doctrine of contributory negligence[25] since the first reported case in 1809:[26] first, a desire to protect new industries by controlling their potential liabilities in trials before supposedly plaintiff-minded juries; second, the desire to find a single dominant cause of the loss; and third, the difficulty of apportioning the loss fairly among the parties. Many juries, judges and legislatures do not favor the defense of contributory negligence because of its harsh and unsatisfactory results.[27] The loss sustained in an accident is arbitrarily placed on the plaintiff, regardless of the fault of the other party. Generally the plaintiff is least able to bear the loss. Moreover, the contributory negligence rule does not have the socially dsirable effect of deterring substandard conduct. The risk of economic loss will not discourage negligent conduct where the far more serious consequences common in crossing accidents has failed. On the other hand, the imposition of the loss on the railroad would tend to make safety measures, such as better supervision of train crews, the installation of mechanical warning devices and construction of under or over passes, economically more feasible. The railroad has a broad market over which to spread these costs. Where the negligence of the railroad has been a

[23]Thus, where the railroad is negligent in failing to provide an adequate warning system so that a traveler unfamiliar with the crossing, due to the negligence of the railroad, collides with the train and is injured, the negligence of the railroad is the proximate cause of the injury and it is liable. If the traveler is familiar with the crossing or is aware of its existence, but fails to look and listen and if necessary stop to effectuate his looking and listening, then this negligence is also a proximate cause of the injury. The negligence of both contributes to the injury. This contributory negligence still operates as a complete defense and will bar the traveler's recovery.

[24]RESTATEMENT, TORTS §§ 440-443 (1934).

[25]PROSSER, TORTS § 64 (1964).

[26]*Supra* note 5.

[27]"For many years, juries have been deciding cases just as though there was no such rule of law." YOUNG, A JURY TRIES THE STATE 61 (1933).

contributing cause of the accident, a more desirable result might be obtained by imposing liability of the railroad, rather than to allow it to have a windfall. However, except for some limited areas such as workmen's compensation,[28] the law has not been willing to totally disregard the plaintiff's contributory fault.

General comparative negligence statutes providing for the apportionment of damages according to the fault of the parties in negligence actions, have been adopted in a few jurisdictions.[29] Under these statutes, contributory negligence only mtitgates damages, whereas a superseding cause still remains a total bar to recovery. The determination of relative fault complicates the problem for the triers of fact, but the result, even if merely an approximation, is more equitable than the total bar of the contributory negligence rule.[30] To insure that juries do not award total damages without deducting for the plaintiff's fault, the device of the special verdict has been used.

The comparative negligence theory has also been used in special situations. Most admiralty courts apportion the loss resulting from collisions in proportion to the fault of each of the ships involved.[31] Workman's compensation legislation commonly provides that the contributory negligence of the injured employee should not bar recovery, but that damages should be diminished in proportion to the amount of negligence attributable to the employee.[32] Similar provisions in Florida[33] and Virginia[34] apply to grade crossing accidents arising from the failure of the train to give the proper signals. Even under these statutes, where testimony conflicted as to whether the statutory signals were given, the courts have sometimes found that the negligence of the driver approaching the crossing was the sole proximate cause of the injury,[35] and that application of the comparative negligence statutes was not proper.

[28]R.C.M. 1947, § 92-201.

[29]Under a pure comparative negligence statute, if the plaintiff was 25 percent at fault and the defendant 75 percent, and the loss sustained by the plaintiff was $100, the plaintiff would be allowed to recover $75. If both parties suffered loss, the damages of both parties are totaled and each party's share of the loss is determined by their share of the fault. The computation could get complicated with three or more parties all suffering damage and all at fault. For many years admiralty courts divided damages equally. Since the Brussels Maritime Convention of 1909-10, however, courts generally apportion loss in proportion with the fault of each ship involved in a collision. Turk, *Comparative Negligence On The March*, 28 CHI.-KENT L. REV. 189, 230 (1950). Mississippi, Georgia, Nebraska, Wisconsin, South Dakota and Arkansas have adopted general comparative negligence statutes. Nebraska and South Dakota limit recovery to cases where the negligence of the plaintiff is "slight" while that of the defendant is "gross" in comparison. Arkansas, Georgia, and Wisconsin limit recovery to situations where the plaintiff's negligence is not as great as that of the defendant. See PROSSER, TORTS § 66 (1964).

[30]Some suspect that juries manage to apportion damages according to fault, even without an authorizing statute. PROSSER, TORTS § 66 (1964).

[31]*Supra* note 29.

[32]R.C.M. 1947, § 72-649 dealing with railroad employees is an example.

[33]FLA. STAT. ANN. § 768.06 (1963).

[34]VA. CODE ANN. § 56-416 (1950).

[35]Myers v. Atlantic Coast Line R.R., 86 So.2d 792 (Fla. 1956); Southern Ry. v. Barden, 200 Va. 98, 104 S.E.2d 13 (1958).

The standard of care laid out by the court in the instant case is of itself reasonable. The existence of a grade crossing should elicit caution from the motorist encountering it. The precautions of looking and listening, and even stopping when necessary are slight burdens on the traveler when compared to the consequences of meeting a train upon the crossing. The application of the standard to particular fact situations presents problems. If contributory negligence operates as a complete defense, the failure of courts to distinguish between the theories of intervening cause and contributory negligence will not affect the outcome of a particular case. Both theories would operate to deny recovery. However, if the comparative negligence doctrine is applicable, the distinction is important. If contributory negligence is treated as an intervening cause, it will still operate as a total bar to recovery. Properly viewed, the negligence of each of the parties should be treated as a proximate cause, with contributory negligence merely serving to mitigate damages.

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DECISION OF INDIAN TRIBAL COURT HELD REVIEWABLE THROUGH FEDERAL DISTRICT COURT HABEAS CORPUS PROCEEDING.—An Indian woman sought a writ of habeas corpus in federal district court claiming she was illegally detained by order of the Court of Indian Offenses, Ft. Belknap Jurisdiction, United States Indian Service. The district court held it had no jurisdiction to determine the legality of the decision. On appeal to federal circuit court, *Held:* Remanded to district court for a hearing on its merits. Although Indian tribal courts have been considered courts of independent sovereigns over which federal courts had no jurisdiction, the Indian court in question was in fact an arm of the federal government. The federal district court, in a habeas corpus proceeding had jurisdiction to inquire into the legality of the tribal court's decision. *Colliflower v. Garland,* 342 F.2d 369 (9th Cir. 1965).

Federal courts have consistently held that they have no jurisdiction over Indian tribal courts. The rationale for this is as follows:

> (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign state. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but save as thus expressly qualified, many powers of internal sovereignty have remained in Indian tribes and in their duly constituted organs of government.[1]

[1] DEP'T OF THE SOLICITOR, U.S. DEP'T OF INTERIOR, FEDERAL INDIAN LAW 398 (1958) (hereinafter cited as FEDERAL INDIAN LAW).