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In the recent case of *Broberg v. Northern Pacific Railway Co.*,[1] a motorist, at what would appear to be an ordinary country railroad crossing, drove into the side of the last car of an eleven-car train, which was moving slowly over the crossing. Recovery by the guest in the automobile was allowed on the ground of negligence on the part of the railroad for failure to give adequate warning.

The findings were based on the general rule held previously in the cases of *Norton v. Great Northern R. Co.*,[2] *Jarvella v. Northern Pac. R. Co.*,[3] *and Incret v. Chicago, M., St. P. & P. R. Co.*[4] The court said:

> ". . . While it is the general rule that it is not negligence on the part of a railway company in failing to blow the locomotive whistle, ring the bell, or to place warning-lights along the train where it has stopped on an ordinary crossing or is slowly moving thereover, or to provide a flagman to warn the traffic, such failure may *under peculiar facts and circumstances or under peculiar environments* rendering the situation unusually hazardous, render the company liable for negligence."

In a dissenting opinion Justice Cheadle said:

> "This crossing is an ordinary country crossing, and no peculiar and unusual facts and circumstances or peculiar environment have been shown to exist to bring the case within the holding of the *Jarvella* case, supra. There is evidence that the road surface was dark in color, and for that reason tended to absorb the lights ahead of the automobile. But if such circumstance is to constitute this crossing unusually hazardous, then every railroad crossing of an oiled highway in Montana is likewise unusually hazardous."

The facts considered by the court to be sufficient to raise a jury question as to whether their cumulative effect rendered the crossing extra-hazardous were as follows:

1. Dark night.
2. Blacktop surfaced highway.
3. Upgrade approach to the crossing.
4. Weeds and trees along the approach to the crossing.
5. Railroad tracks were infrequently used.
6. Dark surface of railroad car.

1 (1947) .....Mont....., 182 P. (2d) 851.
2 (1927) 78 Mont. 273, 254 P. 165.
3 (1935) 101 Mont. 102, 53 P. (2d) 446.
4 (1938) 107 Mont. 394, 86 P. (2d) 12.

Examining these facts of the case it will readily be seen that many, if not the great majority of crossings in Montana are questionable as to their extra-hazardous nature at night. Certainly the *peculiar facts and circumstances, and the peculiar environment* considered by the court are commonplace enough on Montana highways.

The question of whether a train is sufficient notice in itself, once on a crossing, can only be decided in relation to the duties of the motorist on the highway. The care required of one party will necessarily reflect the duties placed on the other. The general rule held by the majority of courts in the United States has grown from the proposition that the railroad need not anticipate the negligence of the traveling public, and if conditions are such that a motorist exercising due care will see the obstruction in time to avoid the accident, the railroad may assume he will do so.[5] The general rule follows that under *ordinary conditions* the presence of a railroad train on a crossing is adequate notice to a traveler approaching the crossing, and the railroad need not give additional notice or warning of the danger.[6]

The Montana Supreme Court uses the term, *at an ordinary crossing,* rather than *under ordinary conditions.* However the court considered the peculiar environment of the crossing which included atmospheric conditions, its physical surroundings and the frequency of its use in determining whether it was an ordinary crossing. Thus the term ordinary crossing would seem to mean a crossing under ordinary conditions.

There has been no substantial accord concerning the facts necessary to constitute a crossing more than ordinarily hazardous. It has been held that "a railroad crossing is not more than ordinarily dangerous as a nighttime crossing unless its condition is such that a reasonably prudent person could not by the exercise of ordinary care use the same with safety."[7] The application of specific facts has been more difficult.

The factors considered by the courts may for the purposes here be classified as follows:

[5] (1937) Wm. A. Smith Constr. Co. v. Brumley, (CCA 10th) 88 F. (2d) 803.

[6] (1932) Pa. R. Co. v. Huss, 96 Ind. App. 71, 180 N.E. 919; (1933) Richards v. Maine Cent. R. Co., 132 Me. 197, 168 A. 811; 161 A.L.R. 127.

[7] (1927) Missouri, K. & T. Ry. Co. of Texas v. Long, Com. App., Sec. A, 299 S.W. 854.

I. Permanent physical makeup.
   1. Grade of approach to crossing.
   2. Angle of highway to railroad tracks.
   3. Type of road surface.
   4. Buildings and other obstructions.
   5. Warning devices.

II. Changing physical surroundings.
   1. Trees and weeds.
   2. Other trains, boxcars, etc., obstructing view.

III. Constantly changing conditions.
   1. Atmospheric conditions.
   2. Plaintiff's knowledge of crossing.

IV. Frequency of use.

V. Type and color of train.
   1. Black cars absorb light.
   2. Flatcars give illusion of safety.

In general there is a broad split of authority, with several courts holding that the majority of the variable conditions shown only place a duty of more careful driving on the motorist in order for him to have been in the exercise of due care.[8] Others, including the Montana Supreme Court in the principal case, allow a greater number of the variable conditions to change the nature of the crossing, thus removing the case from the operation of the general rule. Actually in only about one-fifth of the cases have the courts held in fact that a jury question was presented by the circumstances, or upheld the complaint against demurrer.[9]

It is to be noted that the court in the principal case considered elements of the first five classes in deciding whether the crossing was extra-hazardous. Yet the opportunity of both the motorist and the railroad to know of these factors varied greatly with each class. Any case which enlarges the number of classes that are to be considered in determining whether a crossing is extra-hazardous, creates crossings more variable in nature than before. If only Class I items were used, the crossing would remain either ordinary or extra-hazardous. The inclusion of Class II would allow the nature of the crossing to change, but only to a limited and measurable degree. The inclusion of Classes III to V renders the crossing so variable in nature, it is likely that its character can be determined only by a court of law after each accident.

8(1944) Flagg v. Chicago G. W. R. Co., (CCA 8th), 143 F. (2d) 90; 161 A.L.R. 139, N17.

9161 A.L.R. 141..

The ultimate determining factor in deciding which of the above classes will constitute a crossing extra-hazardous should be the public interest.

In arguing for the curtailment of the general rule, it is contended that the exception places the duties of the railroad and the traveling public more nearly on the basis that both have an equal right to the use of the crossing, by equalizing the circumstances required to constitute due care for each party.[10]

However the public interest demands fast economical service from the railroads and rulings such as the principal case may seriously interfere by increasing operating expenses. Equally as true, the public interest demands a knowledge by both railway and motorist of their rights and obligations at crossings. It is the balancing of these diverse interests that should determine the final result.

Apparently the extension of the extra-hazardous crossing doctrine applies to all crossings, and to all types of trains, whether fast, slow or stopped. In practical effect this requires the railroad to provide watchmen or automatic signals at all country crossings in use at night. The possibility of mistake as to the nature of the crossing will necessitate warnings other than the mere presence of the train. But this behavior, which would seem to follow from the principal case as reasonable, would under the *Jarvella* case[11] require a continuation of such warnings. It was there held that such warnings by the railway were a recognition of the extra-hazardous nature of the crossing, and the motorist could rely on their absence.

The principal case has rendered doubtful the duties of both parties at a railroad crossing. The creation of crossings more variable in nature than before without adequate guidposts to identify the changes will necessarily weaken and create more uncertain the duties of the motorist.[12]

The doctrine of extra-hazardous crossings has been instrumental in alleviating the harshness of the general rule. It takes its rightful place in the law, however, only when properly applied. Many courts are guilty of failure to give it sufficient vitality to do its job well, and others, as perhaps in the principal case, allow it to encroach on the rightful domain of the general rule.

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[10](1913) Walters v. Chicago, M. & P. S. Ry. Co., 47 Mont. 501, 133 P. 357, 46 L.R.A. (N.S.) 702.

[11]Note 3, **supra.**

[12]cf, (1926) No. Pac. Ry. Co. v. Moe, 13 F. (2d) 377.