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NEGLIGENCE - DUTY TO DISCOVER CONTINUOUS TRESPASSER OR BARE LICENSEE ON RAILROAD'S RIGHT OF WAY

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NEGLIGENCE — DUTY TO DISCOVER CONTINUOUS TRESPASSER OR BARE LICENSEE ON RAILROAD'S RIGHT OF WAY — Plaintiff alleged that while he was carefully crossing defendant's right of way, on a clearly defined and well worn footpath, he was struck by defendant's engine, which was backing toward the footpath in a "stealthy manner"; that defendant's servants failed to give warning as they were accustomed to do, or keep a lookout; that the footpath had been habitually used in crossing defendant's right of way for many years, that such crossing had been constant, open, and notorious as defendant knew; and that defendant had never objected to this use. Defendant demurred. *Held*, demurrer sustained on the ground that defendant was under no duty to keep a careful lookout for a bare licensee using its right of way. The court further stated that the only duties owed to a bare licensee were not to create a trap, not to inflict wilful or wanton injury, and after his presence was discovered to take reasonable care to prevent injury to him. *Jackson v. Pennsylvania R. R.*, (Md. 1939) 3 A. (2d) 719.

The instant case is of interest in that the court expressly rejects the view adopted in the *Restatement of Torts*.[1] Ordinarily the only duty owed a trespasser is not wilfully or wantonly to cause injury, but as to a licensee, the landowner is burdened with the additional duty to warn of all traps.[2] In general there is no duty to "look out" in either instance. However, some courts find a duty to "look out" when there is habitual trespassing over a limited area by a large number of people.[3] These courts differ as to the classification of this type of intruder, some calling him a licensee, others a trespasser.[4] Probably those courts calling him a licensee do so because of their reluctance to depart from the old common-law rule that there is no duty to see a trespasser, yet feel that lia-

[1] 2 TORTS RESTATEMENT, § 334 (1934): "A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety."

[2] HARPER, TORTS, §§ 88, 95 (1933).

[3] Smith v. Boston & M. R. R., 87 N. H. 246, 177 A. 729 (1935); Davis v. Chicago & N. W. Ry., 58 Wis. 646, 17 N. W. 406 (1883); 8 L. R. A. (N. S.) 1069 at 1076 (1907).

[4] 41 L. R. A. (N. S.) 264 at 265 (1913).

bility should be imposed in this type situation.[5] Such feeling is grounded in various different considerations: that the railroad is engaging in an activity highly dangerous to life and limb, and the risk of serious injury is so great when compared to the inconvenience of the duty imposed, that social expediency requires such precaution; [6] that the railroad has impliedly consented to the use of the right of way and therefore must run its trains with regard to such use of its tracks; [7] that affirmative dangerous use by the railroad knowing an intruder might be present overrides the intruder's wrong; [8] that failure to keep a lookout in this fact situation is wilful, wanton negligence.[9] The courts taking the opposite view have an equally imposing array of reasons: that the railroad has a right to assume that no one will trespass; [10] that the licensee takes his license subject to concomitant risks and perils; [11] that the railroad cannot license its property so as to interfere with its duties to the public as a common carrier.[12] It is to be noted that a few courts have held that the railroad owes the duty of keeping a lookout even to the occasional trespasser.[13] In two states this result has been reached by statute.[14] Whether a duty will be imposed in this type situation is a question of policy, the conflicting factors being the self interest of the railroad and the public, as opposed to the desire to prevent injury to human beings. Though much is to be said on each side, the preservation of human life should outweigh the inconvenience imposed on the railroad. It would therefore seem that a more just and politic rule would be one in accordance with that advanced in the *Restatement of Torts*.

[5] See Bohlen, "The Duty of a Landowner Toward Those Entering his Premises of Their Own Right," 69 UNIV. PA. L. REV. 237 at 249 (1921), on criticism of calling these intruders licensees.

[6] HARPER, TORTS, § 91 (1933).

[7] Davis v. Chicago & N. W. Ry., 58 Wis. 646, 17 N. W. 406 (1883).

[8] McCaffrey v. Concord Electric Co., 80 N. H. 45, 114 A. 395 (1921).

[9] Goswick v. Western & A. R. R., 54 Ga. App. 164, 187 S. E. 205 (1936), noted 25 GEORGETOWN L. J. 208 (1936). Note that the great weight of authority is to the contrary.

[10] Philadelphia & Reading R. R. v. Hummell, 44 Pa. St. 375 (1863).

[11] Jonosky v. Northern Pac. R. R., 57 Mont. 63, 187 P. 1014 (1919).

[12] Illinois Cent. R. R. v. Eicher, 202 Ill. 556, 67 N. E. 376 (1903).

[13] Gulf, C. & S. F. R. R. v. Russel, 125 Tex. 443, 82 S. W. (2d) 948 (1935); Whitesides v. Southern Ry., 128 N. C. 229, 38 S. E. 878 (1901).

[14] Tenn. Code (Michie, 1938), § 2628 (4); Ark. Stat. Dig. (Pope, 1937), § 11,144.