Michigan Law Review

Volume 36 | Issue 3

1938

NEGLIGENCE - DUTY TO RESCUE ONE IN PERIL - LAST CLEAR CHANCE

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NEGLIGENCE — DUTY TO RESCUE ONE IN PERIL — LAST CLEAR CHANCE — Plaintiff's decedent was killed when his car, stalled on a grade crossing, was struck by defendant's train. Plaintiff brought suit in a state court, joining with defendant company a resident signal tower watchman, who regulated the movements of two companies' trains at a railroad intersection near the grade crossing. Plaintiff alleged that the individual defendant saw, or should have seen, the stalled automobile on the track, and that he failed to stop the train and neglected to use the signal devices he controlled. The case was re-

[1] Ford v. Grand Union Co., 268 N. Y. 243, 197 N. E. 266 (1935).

[2] Fletcher v. Baltimore & Potomac R. R., 168 U. S. 135, 18 S. Ct. 35 (1897); Hogle v. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794 (1910).

[3] 268 N. Y. 243, 197 N. E. 266 (1935).

[4] Ibid., 268 N. Y. 243 at 254.

[5] Exton v. Central R. R., 62 N. J. L. 7, 42 A. 486 (1898); Indianapolis St. Ry. v. Dawson, 31 Ind. App. 605, 68 N. E. 909 (1903); Sinn v. Farmers, etc., Bank, 300 Pa. 85, 150 A. 163 (1930).

For an exhaustive treatment on the entire field, see Harper and Kime, "The Duty to Control the Conduct of Another," 43 Yale L. J. 886 (1934).

[6] "Although the mere ownership of land may impose no liability for a nuisance thereon or committed therefrom, still, if the owner suffers his premises to become a standpoint for continual infliction on his neighbor, and such injuries could not be inflicted without standing on his land, he may be held liable . . . as a principal." Hogle v. Franklin Mfg. Co., 199 N. Y. 388 at 397, 92 N. E. 794 (1910).

moved to a federal court. On plaintiff's motion to remand it was *held*, that the federal court had jurisdiction, as plaintiff had stated no cause of action against the resident signal tower watchman. *Toadvine v. Cincinnati N. O. & T. P. Ry.*, (D. C. Ky. 1937) 20 F. Supp. 226.

Had the individual defendant been the engineer of the train which struck deceased, the case would have presented the typical last clear chance situation[1] in which liability would depend upon the view of the court as to discovered peril,[2] and, of course, upon plaintiff's ability to prove (if in a jurisdiction which permits recovery in the ought-to-have-discovered cases) that, after the train had reached a point where the engineer could have seen plaintiff, the exercise of due care would have prevented the collision. The instant case is novel in at least one respect: the attempt to carry liability over to a situation in which the resident defendant had indirect control over the instrumentality which caused the death. In itself, this change of facts would mean nothing. Defendant railroad would be liable, it may be assumed, if a fireman could have discovered plaintiff, though the engineer actually controlled the engine's flight. But, in the instant case there is presented a situation in which the watchman's employment involved operations at the rail crossing, and not at the grade crossing. Liability, if any, would have to be predicated upon an affirmative duty to aid another. In the absence of the master-servant relationship in certain extra-hazardous employments,[3] or some other special relationship between the parties,[4] our courts have denied the existence of a legal duty to rescue another.[5] Even in cases in which it might be supposed that a duty to render assistance would be imposed, it would seem doubtful that such a duty would be recognized if plaintiff's allegations were simply such as to suggest that defendant could have seen that plaintiff was in peril. The recognized distinction applying in the trespasser cases[6] would, by analogy, permit the most liberal court to recognize a general affirmative duty to rescue, and yet deny a duty to be on the lookout for third persons in peril.

[1] 21 MICH. L. REV. 586 at 587 (1923); Goodrich, "Iowa Applications of the Last Clear Chance Doctrine," 5 IOWA LAW BULL. 36 (1919); Hamill, "The Last Clear Chance Doctrine in Michigan," 7 MICH. S. B. J. *270 (1928).

[2] Cf., for example, Cardozo, J., in Woloszynowski v. New York Central R. R., 254 N. Y. 206, 172 N. E. 471 (1930), and the opinion in Teakle v. Railroad, 32 Utah 276, 90 P. 402 (1907).

[3] Harris v. Pennsylvania R. R., (C. C. A. 4th, 1931) 50 F. (2d) 866, commented upon in 30 MICH. L. REV. 479 (1932); Hunicke v. Quarry Co., 262 Mo. 560, 172 S. W. 43 (1914). But see Vanvalkenburg v. Northern Navigation Co., 30 Ont. L. Rep. 142 (1913).

[4] See Warner, "Duty of a Railway Company to Care for a Person It Has Without Fault Rendered Helpless," 7 CAL. L. REV. 312 (1919).

[5] Leading articles in this field include Ames, "Law and Morals," 22 HARV. L. REV. 97 (1908); Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability," 56 UNIV. PA. L. REV. 217, 316 (1908), reprinted in STUDIES IN THE LAW OF TORTS 291 (1926); Bruce, "Humanity and the Law," 73 CENT. L. J. 335 (1911).

[6] Cf., for example, Preston v. Austin, 206 Mich. 194, 172 N. W. 413 (1919) (no duty to an unseen trespasser), with Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117 (1899) (duty to a seen trespasser).