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NEGLIGENCE-DUTY OF CARE-PEDESTRIAN CROSSING BETWEEN CARS OF A TRAIN

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NEGLIGENCE—DUTY OF CARE—PEDESTRIAN CROSSING BETWEEN CARS OF A TRAIN—While attempting passage between cars of a train which was obstructing a public crossing in violation of a statutory time limit, plaintiff was severely injured when the train was set into motion without warning. Plaintiff testified that he did not see the engine of the train since it was at the end of a long string of cars. The trial court excluded plaintiff's evidence that for thirty years it has been the custom of the town's inhabitants to cross between the cars of a train which was blocking a public crossing. Upon completion of plaintiff's case, the trial court sustained a motion to dismiss on the grounds that plaintiff had failed to show that the defendant was guilty of negligence and that plaintiff

himself was guilty of contributory negligence. On appeal, *held*, reversed. The trial court erred in excluding plaintiff's evidence of long, public custom in respect to crossing between cars of a train obstructing a crossing, since it was this very custom that raised the duty of due care. The court further concluded that it could not be said, as a matter of law, that the plaintiff was contributorily negligent; and that even if plaintiff were negligent, it was still for the jury to find whether defendant's negligence in moving the cars without a warning was not the sole proximate cause of plaintiff's injury. *Stratton v. Southern Ry. Co.*, (4th Cir. 1951) 190 F. (2d) 917.

The question of a railroad's duty towards a pedestrian who attempts passage through a train obstructing a public crossing has been answered in the affirmative by a clear majority of the courts.[1] However, a railroad's duty towards such persons is confined rather closely to fact situations similar to that of the principal case. Thus where a pedestrian attempts a passage through cars of a stationary train at a place other than a public crossing, it is generally held that he is a trespasser to whom no duty of due care is owed by the railroad.[2] Similarly, where the obstruction is for a reasonable time only the courts are reluctant to impose a duty of due care upon the railroad unless it can be clearly shown that the pedestrian was actually seen in a position of danger.[3] Yet the principal case places a minimum of emphasis upon the reasonableness of the obstruction. The court found that the long, public habit of crossing between the cars raised the duty of due care and little or no weight was placed upon the fact that the obstruction was in violation of a statutory time limit.[4] Many decisions can be found where the courts allowed the introduction of public custom as evidence, but in many instances the obstruction was either unreasonable or in violation of a statute.[5] Indeed, one court held that custom or habit can have no bearing on the question of a railroad's duty.[6] However, it is submitted that the principal decision is sound.[7] The court places great emphasis upon custom and habit to point up the fact that the railroad should have known that reasonable care was

[1] 52 C.J. 198-199 (1931); 44 AM. JUR. 743-744 (1942).

[2] Martin v. Little Rock & Ft. S.R. Co., 62 Ark. 156, 34 S.W. 545 (1896); Hasting v. Southern Ry. Co., (4th Cir. 1906) 143 F. 260, cert. den. 201 U.S. 649, 26 S.Ct. 762 (1906). But see Smith v. Savannah F. & W.R. Co., 84 Ga. 698, 11 S.E. 455 (1890).

[3] Central of Georgia R. Co. v. Chambers, 183 Ala. 155, 62 S. 724 (1912); Southern Ry. Co. v. Clark, 32 Ky. L. Rep. 69, 105 S.W. 384 (1907).

[4] Of course, a pedestrian could not use the railroad's violation of a statute as a cause of action per se, because it is highly unlikely that the purpose of the statute was to prevent injuries of this kind. On this point see Capelle v. Baltimore & O. R. Co., 136 Ohio St. 203, 24 N.E. (2d) 822 (1940). However, violation of a statute might place a railroad in a position where it could no longer claim a privileged use of the crossing. See Lake Erie & W.R. Co. v. Mackey, 53 Ohio St. 370 at 385, 41 N.E. 980 (1895), where the court said: ". . . the crossing had been obstructed for more than five minutes . . ., which act of continued obstruction if proven, was a violation of law and made the company itself a trespasser."

[5] Sheridan v. Baltimore & O. R. Co., 101 Md. 50, 60 A. 280 (1905); Carmer v. Chicago St. P.M. & O. Ry. Co., 95 Wis. 513, 70 N.W. 560 (1897).

[6] Rumpel v. Oregon Short Line Ry. Co., 4 Idaho 13, 35 P. 700 (1894).

[7] In respect to its holding on contributory negligence, the principal case has the weight

required to prevent injury to the pedestrian. Thus it would seem that the decision is quite consistent with the tort principle that when one takes action in a situation which he knows, or should know, is dangerous to the plaintiff, he must act with reasonable care.

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of authority with it. However, in some jurisdictions a pedestrian may be denied recovery as a matter of law on a theory of contributory negligence. Thus, even where the obstruction was unreasonable, or where there was a public habit of crossing between the cars of a train blocking the way, pedestrians have been held contributorily negligent as a matter of law. See Rumpel v. Oregon Short Line R. Co., supra note 6, and Wherry v. Duluth M. & N.R. Co., 64 Minn. 415, 67 N.W. 223 (1896). A more modern view treats the question of the pedestrian's negligence as a matter of fact to be determined from the circumstances, such as his age, his prudence in looking for the engine of the train, and long public habit of so crossing. See Amann v. Minneapolis & St. L. R. Co., 126 Minn. 279, 148 N.W. 101 (1914); Cherry v. St. Louis & S.F. R. Co., 163 Mo. App. 53, 145 S.W. 837 (1912); and Walker v. Southern Ry. Co., 77 S.C. 161, 57 S.E. 764 (1906).