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Railroads - Duty to Unknown Trespassers

M. E. C.

ant's negligence was the proximate cause and that the defendant was liable for all the consequences of his negligent act.[17]

J. C. M.

RAILROADS—DUTY TO UNKNOWN TRESPASSERS—Plaintiff's one year old child was struck and killed by defendant's train which was travelling at fifty miles per hour on a clear morning in sparsely settled farm country. The child had wandered from its parent's care, up a footpath that crossed the defendant's railway tracks. Plaintiff sues to recover damages for the death of the child, alleging negligence of the defendant by improper speed and other lack of care. *Held,* the railroad was not liable, as it was under no duty to look out for trespassers in open country and might travel at any rate of speed consistent with the safety of its passengers. *Sullivan v. Yazoo & M. V. Railway Company,* 8 So. (2d) 109 (La. App. 1942).

In general, the landowner owes no duty to foresee the presence of, or to prevent injury to unknown trespassers; and this same rule has been applied to the railroad in the operation of trains on its right of way.[1] The railroad has not been charged with knowledge of the trespasser's presence in cases where the person killed was in a forest area 1300 feet from a crossing, and where there were only a few scattered houses and a turpentine distillery in the vicinity;[2] where the person killed was in railroad's yards;[3] or where the person killed was riding on a logging train.[4] In each case the court reiterates that the railroad owes no duty to a trespasser except not to injure him wilfully and wantonly after his presence is known.[5] However, where there is habitual trespassing over a limited area by a large number of people, the railroad is under a duty to "look out."[6] This is in accord with the analogous duty owed by a landowner to habitual and frequent

17. Hall v. Excelsior Steam Laundry Co., Ltd., 5 La. App. 6 (1925).

1. Johnson v. Texas & Pac. Ry., 16 La. App. 464, 133 So. 517, 135 So. 114 (1931); Trotter v. Texas & Pac. Ry., 146 So. 365 (La. App. 1933). 3 Elliott, A. Treatise on the Law of Railroads (1897) 1970, § 1253.

2. Savage and Wife v. Tremont Lumber Co., 3 La. App. 704 (1926).

3. Sizemore v. Yazoo & M.V. Ry., 164 So. 648 (La. App. 1935).

4. Morris v. Great Southern Lumber Co., 132 La. 306, 61 So. 383 (1913).

5. Texas & P. Ry. v. Modawell, 151 Fed. 421, 80 C.C.A. 651, 9 L.R.A.(N.S.) 646 (1907); Whitcomb v. Louisville & N. Ry., 47 La. Ann. 225, 16 So. 812 (1895); Spizale v. Louisiana Ry. and Navigation Co., 128 La. 187, 54 So. 714 (1911).

6. Lea v. Kentwood & E. Ry., 131 La. 852, 60 So. 370 (1913); Jones v. Chicago, R. I. & P. Ry., 162 La. 690, 111 So. 62 (1926) (twenty-five to seventy persons crossed footpath daily); Builliard v. New Orleans Terminal Co., 166

intruders.[7] With the exception of a few states,[8] the general rule is that the railroad company is under no duty to occasional trespassers, except to exercise ordinary care after their presence is known.[9] In *Savage v. Tremont*[10] the Louisiana court held that the railroad company owes no greater duty to a child trespasser on its property than it owes to an adult under similar circumstances.[11] The duty only arises if the presence of the child is known or should be known.[12]

In the absence of a statutory regulation as to the speed of railroads, trains may travel in open country at the highest rate of speed that is consistent with the safety of their passengers.[13] In the following situations the sections have been treated as "open country" and the rates of speed have not been held excessive: thirty to thirty-five miles per hour at a highway crossing in open country,[14] fifty-five miles per hour on a rainy night while passing through a plantation,[15] fifty-seven miles per hour through a hamlet,[16] and sixty miles per hour in a suburban area.[17]

The railroad is under a duty to operate its trains at a reasonable rate of speed in cities,[18] and also where the railroad knows

So. 640 (La. App. 1936) (workers crossed bridge going to and from work everyday). Note (1907) 8 L.R.A.(N.S.) 1069; 2 A.L.I., Restatement of the Law of Torts (1934) 904, § 334.

7. Lowery v. Walker [1911] A.C. 10 (plaintiff injured by a wild horse which had been put in a field known to be continually used by trespassers) is the leading case placing a duty on the landowner to anticipate the presence of habitual trespassers over a limited area, and not to so conduct his activities as to endanger them.

8. Two states have imposed a duty to occasional trespassers by statute. Ark. Stat. Dig. (Pope, 1937) § 8568; Tenn. Code Ann. (Williams 1934) § 2628(4). In a few states the courts have imposed a duty to occasional trespassers. Gulf, C. & S. F. Ry. v. Russell, 125 Tex. 443, 82 S.W.(2d) 948 (1935); Whitesides v. Southern Ry., 128 N.C. 229, 38 S.E. 878 (1901).

9. See note 5, supra.

10. 3 La. App. 704 (1926).

11. O'Connor v. Illinois Central R.R., 44 La. Ann. 339, 10 So. 678 (1892); Fredericks v. Illinois Central R.R., 46 La. Ann. 1180, 15 So. 413 (1894); Peters v. Pearce, 146 La. 902, 84 So. 198 (1920).

12. Ryan v. Louisiana Ry. & Nav. Co., 146 La. 39, 83 So. 371 (1919).

13. Houston v. Vicksburg, Shreveport and Pacific R.R., 39 La. Ann. 796, 2 So. 562 (1887); Davis v. Alexander & W. Ry., 152 La. 898, 94 So. 436 (1922); Campbell & Co. v. Texas & P. Ry., 152 So. 351 (La. App. 1934).

14. Franklin v. Louisiana & A. Ry., 120 So. 679 (La. App. 1929).

15. Jeter v. Texas & P. Ry., 149 So. 144 (La. App. 1933).

16. Winfield v. Texas & P. Ry., 150 So. 43 (La. App. 1933) (hamlet consisted of three stores, cotton gin, potato house, cane derrick, three residences and five tenant houses).

17. Pinckley v. Texas & P. Ry., 165 So. 504 (La. App. 1936) (twelve houses and few buildings in suburb of Natchitoches).

18. McGuire v. The Vicksburg, Shreveport & Pacific Ry., 46 La. Ann. 1543, 16 So. 457 (1894) (boy killed at tracks near depot in Monroe, Louisiana); Sundmaker v. Yazoo & M. V. R.R., 106 La. 111, 30 So. 285 (1901) (two year old child killed within city limits); Harrison v. Louisiana Western R.R., 132 La. 761, 61 So. 782 (1913); Blackburn v. Louisiana Ry. & Nav. Co., 144 La. 520, 80 So. 708 (1919) (intoxicated man killed on tracks at train depot in town).

of a frequently used path.[19] In such cases the important questions are the frequency of use of the tracks by pedestrians, and the railway's knowledge of such use. In determining a reasonable rate of speed for driving in a city the density of population may be a very important factor. For example, the court held in *Nolan v. Illinois Central Railroad Company*[20] that the railroad company is not held to the same strict accountability when the train is being operated within the city limits in a section that is not populated as it is when it operates through a thickly populated city or town.[21]

In deciding the instant case, the court logically followed the established jurisprudence in this state that the railroad is under no duty to keep a lookout for occasional trespassers, whether adults or children; and that the train may travel in open country, at the highest possible speed that is consistent with the safety of its passengers.

M. E. C.

RES IPSA LOQUITUR—BURDEN OF PROOF—While an employee of the defendant was engaged in filling the gas tank of a bus in the defendant's station, a fire occurred which destroyed the bus station and the plaintiff's adjoining automobile repair shop. In a suit for damages the plaintiff invoked the doctrine of res ipsa loquitur[1] and contended that where res ipsa loquitur is applied, it is not only incumbent upon the defendant to refute negligence on the part of its employees, but that he must also affirmatively show the exact cause of the fire. Conceding the applicability of this doctrine, the court declared that the defendant is not required to account for the occurrence and show the actual cause of the injury, but merely to rebut the inference that he failed to use due care. *Davis v. Teche Lines, Incorporated,* 200 La. 1, 7 So. (2d) 365 (1942).

In most jurisdictions when harm occurs under circumstances which, from common experience strongly suggest negligence, and when the instrumentality which occasioned the harm is under exclusive control and management of the defendant so that he is in

19. Jones v. Chicago, R.I. & P. Ry., 162 La. 690, 111 So. 62 (1926); Miller v. Baldwin, 178 So. 717 (La. App. 1938).

20. 145 La. 483, 82 So. 590 (1919).

21. 145 La. at 488, 82 So. at 592.

1. For a thorough discussion of the doctrine see Malone, Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases (1941) 4 LOUISIANA LAW REVIEW 70.