12-1-1974

Unusually Hazardous Railroad Crossings: The Due Care Trend

Ernest J. Szarwark

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.nd.edu/ndlr/vol50/iss2/13

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
UNUSUALLY HAZARDOUS RAILROAD CROSSINGS:
THE DUE CARE TREND

I. Introduction

Virtually every state has a statute regulating the warning devices which must be installed at railroad crossings. Many delegate to a commissioner or board a general power to order the construction of warning devices, while others designate certain types of crossings as always requiring special warnings. Cities and towns are often permitted to regulate crossings within their limits. These laws require the installation of signs, safety gates, electric signals, or other devices to warn motorists and pedestrians of the approach of trains.

A frequent issue in railroad crossing accidents is whether railroads can be found negligent for failing to provide safety devices in addition to those required by statute. A general rule is that statutory standards are no more than minimums which do not preclude a finding of negligence. Thus a driver must not only signal his intent to turn in the manner required by statute; he must also continue to exercise due care in making the turn. The early cases involving railroad crossing accidents adopted this standard. Statutes were treated as only minimum requirements, and railroads were held to a duty of due care. In these early cases, courts stressed the speed and power of trains and the consequent hazards.

As railroads came under greater regulation, courts hesitated to find them negligent for failure to construct warning devices not required by statute. The majority of courts held, as a matter of law, that a railroad cannot be found negligent for such a failure unless there are unusual hazards at the crossing distinguishing it from the ordinary country crossing.

A few courts made the railroad’s duty of care coextensive with statutory requirements. They held, as a matter of law, that negligence may never be predicated upon the absence of signals or other warnings of the crossing unless they are required by statute. These holdings have been criticized for relying

---

1 WASH. REV. CODE § 81.53.261 (Supp. 1973); N.Y. RAILROAD LAW § 95 (McKinney Supp. 1973); NEV. REV. STAT. § 704.300 (1973); IND. CODE § 8-6-7.7-2 (Supp. 1974).
2 CAL. PUB. UTIL. CODE § 7538 (West Supp. 1974).
3 MO. ANN. STAT. §§ 79.420, 77.540 (Vernon 1956); NEV. REV. STAT. § 266.295 (1973).
upon a dubious interpretation of legislative intent, and have generally been re-
jected by later decisions.21

While the vast majority of states presently adhere to the unusual hazard
rule,22 recent cases indicate a return to the due care standard. This standard is
in accord with general common law principles and modern concepts of driver
and railroad responsibility.

II. The Unusual Hazard Rule

A. A Restriction on Juries

Under the unusual hazard rule it is not enough merely to show that the
crossing is of such a nature that a reasonably prudent person would realize ad-
ditional warning devices are necessary. Before the issue of negligence is even sub-
mitted to the jury, the plaintiff must establish to the satisfaction of the court that
the crossing where the accident occurred possessed those characteristics recog-
nized as unusual hazards.23 Failure to demonstrate the presence of such char-
acteristics is adequate ground for a directed verdict in favor of the railroad;
failure to direct a verdict is reversible error.24

In operation, the unusual hazard rule is not a precise standard, but rather
a tool which courts use to control the proplaintiff tendencies of juries.

[T]he question of determining when a grade crossing . . . becomes extra-
hazardous or dangerous and of such a character that the safety of the users
of the highway requires additional warning signals other than the regular
highway crossing signs, is not within the province of the jury.15

The rule gives railroads a decided advantage “since courts seem reluctant to hold
any situation extrahazardous or unusual.”25

The purpose of the unusual hazard rule is to limit jury discretion. As one
advocate of the standard has said, “The view that it is entirely a question for
the jury whether the statutory signals or speed are reasonable may lead to the
extreme of requiring such caution as virtually to disrupt train service.”26

B. Circumstances Constituting Unusual Hazards

The application of the unusual hazard rule has proven difficult. Significant
disagreements exist between states as to the application of the rule, and decisions

---

11 Licha v. Northern Pac. Ry., 201 Minn. 427, 276 N.W. 813 (1937); Price v. Seaboard
is discussed at 22 Minn. L. Rev. 901 (1938).
13 See 20 Ok. L. Rev. 84, 86 (1940).
16 Supra note 13, at 85.
17 37 Yale L. J. 997, 998 (1928).
within states are often confusing. In determining the presence of an unusual hazard, courts have considered factors such as the ease with which travelers can detect the approach of a train at a crossing, and the amount and character of train and car traffic over the crossing.

Obstructions of vision which make a crossing difficult to detect include the presence of train cars near the crossing hiding the approach of trains on other tracks, bushes or buildings near the crossing, and the acuteness of the angle at which the highway and track intersect. Some courts distinguish between urban and rural crossings, holding that obstructions not on the railroad's right-of-way are not unusually hazardous if the crossing is in a rural area. However, such obstructions may be held to create an unusual hazard at an urban crossing.

Though adverse weather conditions may obscure visibility, courts have been reluctant to hold railroads negligent for not anticipating and providing for relatively transitory weather conditions. Thus rain, snow, or fog will not alone make a crossing unusually hazardous, but weather may be considered as a factor where other circumstances are also present.

A train blocking a crossing has been held not to be an unusual hazard. Courts have reasoned that the very presence of the train on the track is sufficient warning to motorists keeping proper watch. Consequently, some states hold as a matter of law that when a car collides with a train already occupying a crossing, the driver can never recover. However, the majority of states permit recovery if the crossing is shown to have been unusually hazardous. Nevertheless the difficulty of recovery is demonstrated by the fact that in approximately half of such cases decided between 1946 and 1962, the courts have directed verdicts for the railroads.

The frequency with which cars, trains and pedestrians use a crossing is generally considered relevant in determining whether a crossing presents an unusual hazard. A few states require a showing that the amount of traffic had some effect in causing the injury. Some courts have used the Peabody-Dimmick formula which state and federal highway departments employ to determine priorities in funding crossing repairs. This formula is a statistical correlation, based upon 3,563 accidents, relating the amount of car and train traffic to the number of accidents associated with crossings using particular types of warning.

---

24 See 36 Mo. L. Rev. 596 (1971).
Given the amount of traffic and the type of warning at a crossing, the formula is used to compute the probable number of accidents per year. Greater use of the formula has been hindered because its accuracy has not been prospectively proven, and it ignores such variables as weather, darkness, and obstructions near a track.

To recover, the plaintiff must thus work his way through a maze of conflicting precedents and fine distinctions to establish the unusually hazardous character of the crossing; he must do this to the satisfaction of the court before he can reach the jury. The Supreme Court of Oregon reflected upon the effect of the unusual hazard rule, saying:

The utility of railroads and the relative difficulty in controlling and maneuvering a train as compared with an automobile have caused the law to give railroads a position of preference. It may be that the law will someday be reevaluated in the light of changing conditions and values.

III. The Trend Toward a Due Care Standard

Despite the tradition of the unusual hazard rule, recent cases indicate that it is falling into disfavor. Recent decisions have employed three methods to attack the unusual hazard rule in order to replace it with a standard of due care: (1) distinguishing past cases, (2) overruling past cases, and (3) redefining unusual hazards.

A. Distinguishing Past Cases: The California and Michigan Approach

California and Michigan have adopted the due care standard by noting early decisions accepting the due care standard and holding that later cases speaking of unusual hazards were misapplications of that rule. As early as 1943, in Peri v. Los Angeles Junction Railway, the California Supreme Court cited the inconsistencies in past decisions and held that the proper standard was due care.

The standard of care is that of the man of ordinary prudence under the circumstances. The question of the negligence of the railroad operator is ordinarily one of fact in crossing cases as it is in other negligence cases. . . . Too frequently appellate courts have ignored those fundamental principles when dealing with railroad crossing accidents, and have arbitrarily substituted their conclusions of law as to the care a man of ordinary prudence would exercise. . . .

31 Senegal v. Thompson, 91 So. 2d 865 (La. App. 1956).
33 22 Cal.2d 111, 137 P.2d 441 (1943).
34 Id. at 120, 137 P.2d at 446, cited with approval in Herrera v. Southern Pac. R.R., 155 Cal. App. 2d 781, 785, 318 P.2d 784, 786 (1967).
Later California decisions have affirmed the principle that "statutory regulations constitute only the minimum measure of care required by the railroad, and it is usually a matter for the jury to determine whether something more than the minimum was required." 5

In 1964 Michigan joined California in adopting the due care formula. In Emery v. Chesapeake & Ohio Railroad Company, 86 the trial judge had granted a judgment for the railroad because of the plaintiff's failure to show special circumstances making the crossing unusually hazardous. In doing so he relied upon a series of Michigan cases which has seemingly accepted the unusual hazard rule. 7 On appeal, the Michigan Supreme Court began with an analysis of several of the state's early railroad crossing cases, 8 and concluded that although it had asserted the due care standard it had refused "more often than not to apply it," 9 especially in the more recent cases. The court criticized the unusual hazard rule as a rejection of sound common law principles, and as an encouragement to usurpation of jury functions by judges.

Michigan has continued to apply the Emery test. In Erbel v. Saginaw Road Commissioners, 40 the trial court had instructed the jury that the railroad was under no duty to provide extrastatutory warnings of its crossing and that it could not be found negligent in not providing them unless the crossing were shown to have been unusually hazardous. The Michigan Supreme Court said of the instructions:

> We do not regard this as adequate or accurate. . . . The test is not whether the conditions were unusually dangerous, but whether what was done under the circumstances met the test of an ordinarily prudent man under the same or similar circumstances. 41

Though the jury may still be instructed as to the railroad's compliance with statutory requirements, such compliance merely constitutes the minimum of care. 42 No prior determination of unusual hazard is necessary for a jury to find a railroad negligent for failure to provide warnings in addition to those required by statute.

---

40 Id. at 605, 194 N.W.2d at 368.
B. Specific Overruling of Earlier Cases: The Oregon Approach

The Oregon Supreme Court adopted the due care test by directly overruling a long series of prior cases adhering to the unusual hazard standard. In *Koch v. Southern Pacific Company*, the plaintiff was a passenger in an automobile which collided with defendant's train. The jury was instructed on the basis of the unusual hazard rule. On appeal, the court acknowledged three defects in the unusual hazard rule: (1) the encouragement given trial judges to encroach upon jury functions, (2) the difficulty of administering the rule, and (3) the tendency of the rule to unduly favor railroads.

The court concluded that railroad crossing cases should be treated under the same standard of due care applied in other negligence cases. Instead of holding automobile drivers to a standard of due care and railroads to an unusual hazard standard, henceforth "the duty of both railroad and motorist should be that of reasonable care under the attendant circumstances."

C. Redefining Unusual Hazards in Terms of Due Care: The Kansas and Wisconsin Approach

In *Sexsmith v. Union Pacific Railroad Company*, the trial court judge directed a verdict for the defendant railroad holding that the plaintiff had not established that the crossing in question was unusually hazardous. The Kansas Supreme Court reversed this decision, defining unusual hazards in terms which are more consistent with the due care standard. The court said:

We . . . recognized the rule . . . that where unusually dangerous conditions prevail at a railroad crossing the unusual hazard may make additional warnings and precautions by the railroad company necessary. The crux of the matter is simply whether the railroad has afforded users of the crossing sufficient and adequate protection under the reasonably careful person rule.

In *Kurz v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, the Wisconsin Supreme Court held that an approval of the railroad's crossing by a public service commissioner would not preclude a finding of negligence based on a failure to provide more adequate warnings where the crossing was unusually hazardous. In clarifying the standard, the court stated that, "An 'ultrahazardous crossing' is a relative term and simply means the hazards of the railroad crossing demand more or better safety devices than it has."
The Wisconsin and Kansas cases demonstrate an erosion of the unusual hazard standard and a tendency to return to the common law due care standard. They are significant indications of the trend in railroad crossing cases back to the due care rule.  

IV. Conclusion

The unusual hazard rule is a peculiarity of railroad crossing cases which has been used by courts to limit the liability of railroads by narrowing the power of juries to find railroads negligent for not having provided warning devices not required by statute. A growing number of states have expressed dissatisfaction with the rule on the grounds that it is out of step with modern concepts of responsibility and encourages judges to usurp functions. The trend in recent cases has been to return to the common law standard of due care. Under this standard, a finding of negligence can only be overturned where it is manifestly against the weight of the evidence using the same tests applied by courts in other negligence areas.

The trend to permit juries to find railroads negligent under the due care test is in harmony with recent developments in other areas of tort law. Most importantly, it reflects modern attitudes toward the standard of care expected of railroads and motorists at crossings.

Ernest J. Szarwark

---

51 Statistics substantiate the growing trend of courts to permit questions regarding the negligence of railroads to go to the jury. In cases involving cars colliding with trains which were already at the crossing (see text accompanying notes 24-27 supra), the courts before 1946 directed verdicts against the plaintiff in about four-fifths of the decided cases, Anno., 161 A.L.R. 111, 142 (1947). Since 1946 courts have so directed verdicts in only about half of such cases, Anno., 84 A.L.R.2d 813, 823 (1962).

52 See text accompanying notes 13-17 supra.

53 See text accompanying notes 33-51 supra.


55 See generally, Terry, Of Railroads—And Torts—And Trends, 16 DEFENSE L. J. 1 (1967).
Pages 387-392 are Intentionally Blank.