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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Comments

### DUTY OF LOOKOUT IN MISSOURI TO PERSONS ON THE PREMISES WITHOUT THE CONSENT OF THE POSSESSOR

In determining the liability of an occupier of land for injuries to persons thereon, the courts do not apply the ordinary analysis for negligence, namely, whether an unreasonable risk of injury can be anticipated to raise a duty of care. The law as to the liability of the occupier of premises developed with the emphasis on the

property element as a carry-over from the feudal system of land tenure, under which the interests of the landowner were protected in preference to those of persons who might be injured on the premises. It was thought that a landowner should have the right in general to use his own land as it suited his convenience. With the development of modern conditions, this freedom has diminished in significance and the liability of the landowner has been correspondingly increased. However, the influence of the old concept of property rights is still existent.<sup>1</sup>

The possessor of land is ordinarily under no duty to exercise due care to protect persons on his land without his consent. He need not anticipate the presence of a trespasser; indeed, he may even ignore the possibility of his presence. Unless he has actual knowledge or notice of his presence, no duties exist, and even then as to dangers connected with the premises the trespasser enters at his own peril.<sup>2</sup> Only in certain instances it has been found desirable to impose certain duties on occupiers of land in acting affirmatively with reference to persons thereon without his consent and unknown or unseen, and those are where the public interest in preventing injuries to such persons is believed far to outweigh the additional inconvenience suffered by the occupier.<sup>3</sup> Here, due to the number of persons trespassing, the danger is so great and the social interest in preserving life so impelling that a break is made in the traditional position of the possessor. This duty is applied chiefly in railroad cases.<sup>4</sup> More precisely, the rule quite generally stated is that a possessor of land who is carrying on a dangerous activity owes a duty of lookout only as to constant trespassers over a limited area under such circumstances that their presence may reasonably be anticipated. These are the trespassers who persistently intrude upon some particular area of the land.<sup>5</sup> Some courts speak of them as bare or mere licensees for the reason that they wish to give protection to this class of people and at the same time not be forced to reverse their traditional stand that a possessor of land has no duty to anticipate the presence of trespassers. By using this device, these courts hope to preserve the symmetrical pattern of the law.<sup>6</sup> Whether these people are called licensees or trespassers, the duty of the possessor as to them is the same, and the duty of lookout is unaffected by a statute providing that persons not connected with a railroad or employed upon it and walking on the track, except at streets or crossings, shall be deemed trespassers.<sup>7</sup> This duty of lookout is not imposed when the trespassers persistently wander at large over the land; only when the one in possession of the land knows, or from facts within his knowledge should know, that these individuals

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1. BOHLEN, *STUDIES IN THE LAW OF TORTS* (1929) 163; McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land* (1936) 1 MO. L. REV. 45.

2. HARPER, *TORTS* (1933) § 91.

3. BOHLEN, *STUDIES IN THE LAW OF TORTS* (1929) 163, 179.

4. *Smith v. Norfolk & Southern R. R.*, 114 N.C. 445 (1894); *The H. & T. C. Ry. v. Sympkins*, 54 Tex. 615 (1881).

5. HARPER, *TORTS* (1933) § 91.

6. McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land* (1936) 1 MO. L. REV. 45, 55.

7. *Ahnfeld v. Wabash R. R.*, 212 Mo. 280, 111 S.W. 95 (1908).

continually enter upon some particular part of the premises.<sup>8</sup> Since the occupier of the land has a superior right, he may rely on the trespasser's yielding and getting out of the way upon timely warning, but if he does not yield or has not had sufficient time to get out of the way after the warning, then the occupier must exercise a reasonable degree of care to avoid injuring him.<sup>9</sup>

The most usual opportunity of applying the doctrine is where trespassers are injured while walking upon the track of the defendant railroad at a place where members of the public use a part of the track as a footpath to shops, mines, and other places of similar nature. The knowledge of the railroad of such uses of the tracks as a footpath may be established, not only by the use itself, but also by the presence of well worn paths,<sup>10</sup> gates in a railroad fence,<sup>11</sup> and steps constructed over a railroad fence.<sup>12</sup>

The courts have found a duty of lookout as to workers walking the tracks, going to and returning from work, where the track extended through a thickly populated neighborhood just outside the limits of a city;<sup>13</sup> as to persons customarily using a portion of the track as a footpath while engaged in the business of towing sand boats up a river, this use of the track being necessary because of insufficiency of the space between the track and the river;<sup>14</sup> as to workers using a part of a track in an urban area for the purpose of going to and from nearby stone quarries;<sup>15</sup> as to persons walking on the track going past a contractor's camp and a rock quarry, a busy community having grown up about these projects;<sup>16</sup> as to pedestrians on the part of the track passing through a tunnel where it was commonly used as a passageway by members of the public;<sup>17</sup> as to children accustomed to playing about the cars in a switchyard;<sup>18</sup> as to persons walking on a railroad trestle in general use by the public for that purpose.<sup>19</sup>

It is recognized that railroads have a duty to maintain a reasonable lookout at public crossings, for it is to be expected that members of the public will be present. Where the crossing is a private one, however, the relationship of the parties is somewhat different. Where the persons using such a crossing are in the number or class authorized to use it, the duty of the railroad as to them is the same as where the crossing is public. But there is no duty on the part of the railroad to anticipate the presence of the general public at such a crossing unless they are known to be

8. RESTATEMENT, TORTS (1934) § 334.

9. 52 C. J. 604.

10. *Starks v. Lusk*, 194 Mo. App. 250, 187 S.W. 586 (1916), *aff'd without opinion* in 280 Mo. 268, 216 S.W. 1119 (1919).

11. *Lynch v. St. Joseph & Iowa R. R.*, 111 Mo. 601, 19 S.W. 1114 (1892).

12. *Morgan v. Wabash R. R.*, 159 Mo. 262, 60 S.W. 195 (1900).

13. *Chamberlain v. Missouri Pac. Ry.*, 133 Mo. 587, 33 S.W. 437, 34 S.W. 842 (1896).

14. *LeMay v. Missouri Pac. Ry.*, 105 Mo. 361, 16 S.W. 1049 (1891).

15. *Guenther v. St. Louis, I. M. & S. Ry.*, 95 Mo. 286, 8 S.W. 371 (1888).

16. *Yakubinis v. Missouri, K. & T. R. R.*, 345 Mo. 943, 137 S.W. (2d) 504 (1940).

17. *Fearons v. Kansas City Elec. R. R.*, 180 Mo. 208, 79 S.W. 394 (1903).

18. *Dalton v. Missouri K. & T. Ry.*, 276 Mo. 663, 208 S.W. 828 (1919).

19. *Starks v. Lusk*, 280 Mo. 268, 216 S.W. 1119 (1919).

accustomed to cross at that place.<sup>20</sup> Thus recovery was denied where the plaintiff, injured at a private farm crossing, proved neither that he had the necessary authorization, nor that the crossing was in frequent use by the public.<sup>21</sup>

The Missouri courts have not been inclined to find any special duty of lookout as to persons lying or sitting upon the tracks. Even where there is a duty of look-out as to persons using the track as a footpath the engineer is not chargeable with notice that a man is likely to be lying on the track.<sup>22</sup> The railroad is not liable for the failure to discover the plaintiff "in the absence of evidence establishing the usage of the track at the particular place for the purpose of lying down."<sup>23</sup> It would be rather difficult to think of an instance where this would be possible.

An interesting question is whether there is any duty, after an object has been discovered on the tracks, to see whether the object is a human being. This would be especially important in cases where there is originally no duty as lookout. In an early Missouri case where there was no showing of any general duty of lookout the court held that the defendant railroad would be liable if, after perceiving an object on the track, it could by the exercise of ordinary care have discovered the object to be a human being.<sup>24</sup> The court later reversed its prior ruling and held that there was no liability in the absence of a general duty of lookout unless the engineer has actual knowledge that the object he has seen lying on the track was a human being.<sup>25</sup>

The duty of lookout sometimes arises before the commencement of the movement of the train. Thus a duty of lookout exists as to a child underneath a car in a switchyard if children are accustomed to playing about standing cars in the switchyard.<sup>26</sup> To avoid injuring the child it would be necessary to discover him under the car before moving it forward.

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20. 52 C. J. 175-80. The purpose of imposing a special duty on the railroad here is evidently to protect those who wish to cross the tracks. However, the case of *Torrance v. Pryor*, 210 S.W. 430 (Mo. 1919), extends the application of the doctrine to include a duty of lookout as to persons at a public crossing, even though they are there with no intention of going across the tracks. In that case the plaintiff had started to walk down defendant's track at the crossing when struck by a train but was toward the side of the street and beyond the main traveled way of such street. The plaintiff intended, after passing through the crossing, to continue on down the railroad track, to the home of a friend. The court did not consider the fact that the plaintiff was beyond the main traveled way of the street, apparently not considering there was any significance as to the intentions of the plaintiff. While in the crossing the plaintiff was entitled to the same protection as any other member of the public.

21. *English v. Wabash Ry.*, 341 Mo. 550, 108 S.W. (2d) 51 (1937).

22. *Ayers v. Wabash R. R.*, 190 Mo. 228, 88 S.W. 608 (1905); and see *Carpenter v. Kurn*, 345 Mo. 877, 136 S.W. (2d) 997 (1940).

23. *Cochran v. Thompson*, 148 S.W. (2d) 532 (Mo. 1941).

24. *Isabel v. The Hannibal & St. J. R. R.*, 60 Mo. 475 (1875).

25. *Voorhees v. Chicago, R. I. & Pac. R. R.*, 325 Mo. 835, 30 S.W. (2d) 22 (1930); *Cochran v. Thompson*, 148 S.W. (2d) 532 (Mo. 1941).

26. *Burnam v. Chicago Great Western R. R.*, 340 Mo. 25, 100 S.W. (2d) 858 (1936).

The duty of lookout extends to the protection of persons not on the tracks, but who may be injured by passing trains because of close proximity to the tracks,<sup>27</sup> or later injured after having come onto the tracks. Thus the railroad has the duty to observe the movements of a child who is moving about near the track in such a way as to indicate that he may later go onto the track and to commence to stop the train when in the exercise of ordinary prudence the railroad could see that the child is running into danger.<sup>28</sup>

In determining whether there is a duty of lookout in a given instance one should not only consider the place in question but the time also. The duty exists in a case where an accident occurs on a railroad track if large numbers of the public are accustomed to being on the track at the hour of the accident.<sup>29</sup>

The duty of lookout includes not only making an effort to see persons to whom the duty is owed but also an obligation to do certain things that will make it possible for the effort to be effective. In backing a train over a portion of the track where pedestrians have a right to be, ordinary care requires that the railroad company place someone on the last car to look for such individuals.<sup>30</sup> Likewise where there is an obstruction in front of the train, such as a coal tender, there is a similar duty to place someone in front in a position to see persons on the track.<sup>31</sup> Similarly a railroad is negligent in proceeding on a dark night without a headlight over part of its track where the presence of pedestrians should be anticipated.<sup>32</sup>

A difficult problem in the law is the question whether this duty of lookout still exists when the possessor has objected to the intrusions and has taken measures to make known his objection. It would seem rather difficult to place liability upon the basis of implied consent to be on the land if there is an express denial of such authority. Confronted with this problem the Missouri court has sometimes found a duty of lookout in such instances and on other occasions has refused to do so. In *Hyde v. Missouri Pacific Ry.*,<sup>33</sup> the defendant had posted notices forbidding the public to walk the tracks through the company's yards, continuously objected to the practice, and for a while had had a special watchman to warn people away, although there was no showing that he was still acting in that capacity at the time of the accident. These warnings were disregarded by many people who continued to walk the tracks. The court said that the acquiescence needed for a license was not present and consent could not be inferred. Hence the plaintiff had no right to be on the tracks and there was no duty of lookout.

In *Fearons v. Kansas City Elevated Ry.*,<sup>34</sup> the plaintiff's husband was killed on a part of the track running through a tunnel, which had for years been used by the public as a passageway. The warning "no admittance" at the entrance

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27. *Kreis v. Missouri Pac. Ry.*, 131 Mo. 533, 33 S.W. 64, 33 S.W. 1150 (1895).

28. *Livingston v. Wabash R. R.*, 170 Mo. 452, 71 S.W. 136 (1902).

29. *Fiedler v. St. Louis, I. M. & S. Ry.*, 107 Mo. 645, 18 S.W. 847 (1891).

30. *Beard v. Missouri Pac. Ry.*, 272 Mo. 142, 197 S.W. 907 (1917).

31. *Morgan v. Wabash R.R.*, 159 Mo. 262, 60 S.W. 195 (1900).

32. *Cotner v. St. Louis & S. F. R. R.*, 220 Mo. 284, 119 S.W. 610 (1909).

33. 110 Mo. 272, 19 S.W. 483 (1892).

34. 180 Mo. 208, 79 S.W. 394 (1903).

to the tunnel was generally disregarded. It was held that this warning would not act to prevent a duty of lookout arising. The court admitted that the *Hyde* case seemed to be in conflict with other decisions of the court, but said that the conflict was more apparent than real, the conclusion in the *Hyde* case being occasioned by the special facts of that case. However, the court did not point out what any of the special facts were that it thought so significant. The appellant in the *Fearons* case had contended that the respondent's husband was not a licensee and so the company should not be liable, relying on the authority of the *Hyde* case. The court said that if the *Hyde* case should be construed as contended by the appellant, who wished to apply it to the facts of the *Fearons* case, it would not be in harmony with the overwhelming weight of authority and would not be followed.

In *Frye v. St. Louis, Iron Mountain and Southern Ry.*,<sup>35</sup> three years later, the court held that there was no duty of lookout on the track when the accident occurred, the defendant having posted notices forbidding pedestrians to walk on the tracks. The court attempted to distinguish the *Frye* case from the *Fearons* case by saying that the *Fearons* case the very employees operating the car doing the damage had notice that the warning sign was disregarded; while in the *Frye* case the notices were "line" notices, and the people walking on the track understood that they went on the track against the will of the defendant, knew that there was danger on the track, and expected to look out for themselves. The court here does not go so far as in the *Hyde* case. In the *Hyde* case the decision was rendered on the basis of the lack of consent by the defendant to the use of the track by pedestrians as evidenced by his posting of notice, so that there could be no implied license; while in the *Frye* case the court emphasizes the state of mind of the pedestrians, saying that the effect of the notices was to cause the pedestrians to believe that they proceeded at their own risk in going upon the track. In actual practice it would seem rather difficult to make the plaintiff's recovery depend upon the application of a test of the state of mind of other pedestrians. The court mentioned also that there was a statute providing that pedestrians on the track with certain exceptions should be deemed to be trespassers. Since the plaintiff was not within the scope of any of the exceptions he was a trespasser and guilty of contributory negligence. In a subsequent case, when this point was more directly involved, the court held that the effect of the statute was not to change the duty of lookout.<sup>36</sup>

In *Starks v. Lusk*,<sup>37</sup> the plaintiff was injured while crossing a trestle which was in the yards of the defendant railroad and within the switching limits. The court held that posting notice would have no effect in relieving of the duty to exercise a reasonable lookout here since the notices were generally disregarded by pedestrians. This view seems a more reasonable one to accept. The courts have employed the device of implied license because public policy demands that certain protection be

35. 200 Mo. 377, 98 S.W. 566 (1906).

36. *Ahnefeld v. Wabash R. R.*, 212 Mo. 280, 111 S.W. 95 (1908).

37. 280 Mo. 268, 216 S.W. 1119 (1919).

given to constant trespassers over a limited area. These people disregard the rights of the possessor by trespassing on his premises. As a matter of fact they will continue to trespass, even though expressly forbidden to do so. The same necessity for protection exists in the one instance as in the other, but if an express denial of permission to enter the premises relieves of liability, then the implementing of the policy of affording protection will be completely frustrated.

WILLIAM E. AULGUR