73.00

RAILROAD CROSSINGS

INTRODUCTION

The instructions in this section are unchanged even though there have been extensive changes and developments in the law which have had a profound impact upon the trial of railroad crossing cases.

In 1971 when IPI 2d was published, Illinois was a contributory negligence state and many railroad crossing cases failed because the plaintiff was found to be contributorily negligent as a matter of law. *Greenwald v. Baltimore & O. R. Co.*, 332 Ill. 627, 631-632; 164 N.E. 142, 143-144 (1928); *Tucker v. New York, C. & St. L. R. Co.*, 12 Ill.2d 532, 147 N.E.2d 376 (1957); *Moudy v. New York, C. & St. L. R. Co.*, 385 Ill. 446, 53 N.E.2d 406 (1944).

However, in 1981, the Illinois Supreme Court embraced comparative negligence in its pure form. *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981). Thereafter, a claim for damages for injury or death as the result of a collision at a railroad crossing could and did succeed even though the plaintiff was found to have been partly at fault. This rule (pure comparative negligence) was subsequently changed by the legislature affecting causes of action accruing on or after November 25, 1986, and now a claim is barred if the injured party's (or decedent's) fault was more than 50%. 735 ILCS 5/2-1107.1 (1994).

The adoption of comparative negligence, however, does not necessarily alter preexisting duty rules. For example, the doctrine does not change the rule that, ordinarily, a train stopped at a crossing is itself adequate notice of its own presence, and therefore the railroad has no duty to provide additional warnings unless the plaintiff can show "special circumstances." *Dunn v. Baltimore & O. R.R. Co.*, 127 Ill.2d 350, 537 N.E.2d 738, 741-743; 130 Ill.Dec. 409, 412-414 (1989) (no special circumstances shown).

There have been other changes which have affected trials and the results of trials which, while not as far reaching as the abandonment of contributory negligence as a total bar to a recovery, have had an impact upon railroad litigation.

At the time that these instructions were originally formulated, Ill. Rev. Stat. ch. 111 2/3, &p;77, provided for the imposition of punitive damages for wilful violations of the Public Utilities Act. Section 73 of that act provided:

> In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this act or any rule, regulation, order or decision of the commission, issued under authority of this act, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the court shall find that the act or

> omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by the way of punishment. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.

In *Churchill v. Norfolk & W. Ry. Co.*, 73 Ill.2d 127, 383 N.E.2d 929, 23 Ill.Dec. 58 (1978), the Illinois Supreme Court held that this act provided a remedy for personal injuries sustained as a result of the violation of ICC rules. That remedy was also available to persons who had sustained financial injury from death caused by a wilful violation of the Public Utilities Act.

The Public Utilities Act was amended effective October 1, 1985, to exclude railroads, but the remedy remains available for any claims resulting from injuries sustained prior to that date.

A change has been made with respect to the manner in which culpable conduct on the part of the railroad could be established. At the time that these instructions were published in IPI 2d, it was proper to prove that a crossing was very inadequately protected. *Merchants Nat. Bank v. Elgin J. & E. Ry. Co.*, 121 Ill.App.2d 445, 257 N.E.2d 216 (2d Dist.1970), *aff'd*, 49 Ill.2d 118, 273 N.E.2d 809 (1971).

That proof may now no longer be available in some cases. 625 ILCS 5/18c-7401(3) (1994), provides that "[l]uminous flashing signal or crossing gate devices installed at grade crossings, which have been approved by the Commission, shall be deemed adequate and appropriate."

In *Hunter v. Chicago & N.W. Transp. Co.*, 200 Ill.App.3d 458, 558 N.E.2d 216, 146 Ill.Dec. 253 (1st Dist.1990), the appellate court (in dictum) concluded that:

> [T]he legislative intent was that the issue of the adequacy of the warning devices at a crossing, once ordered by the Commission, would no longer be an issue in this type of litigation. Once the Commission has investigated and ordered the installation of a particular kind of warning device, its decision is conclusive, and the railroad is precluded from installing any other signal. 82nd Ill.Gen.Assem., House Proceedings, April 22, 1982, at 114-23.

Id. at 465-466, 558 N.E.2d at 221, 146 Ill.Dec. at 258. However, if the Commission has not acted pursuant to the statute, the plaintiff arguably can still claim that the crossing was not adequately protected.

625 ILCS 5/18c-7401(3) (1994), establishes the duty of a railroad to sound a bell, whistle or horn. Other safety requirements, in addition to those stated in 625 ILCS 5/18c-7401 to 18c-7404 (1994), are now contained in title 92 of the Illinois Administrative Code, which supersedes and rescinds General Order 176 of the Illinois Commerce Commission, and supersedes and rescinds General Order 121 of the Illinois Commerce Commission to the extent that General Order 121 applies to railroads.

73.01 Duty of Driver Crossing Tracks

A railroad crossing is a place of danger. If you believe from the evidence that as the [plaintiff] [decedent] was approaching the crossing he knew, or, in the exercise of ordinary care should have known, that a train approaching the crossing was so close to the crossing that it would be likely to arrive at the crossing at about the same time as the plaintiff's vehicle, then it was the duty of the [plaintiff] [decedent] to yield the right of way to the train.

Notes on Use

This instruction generally should not be used in a case where there are automatic gates or flasher signals at a crossing and there is evidence tending to show that the gates were up or the flasher signals were not operating at the time of the occurrence. However, if there is also evidence sufficient to support a jury finding that, despite the fact that the gates or flashers were inoperative, the driver, in the exercise of ordinary care, should have known that a train was in fact approaching the crossing, this instruction may be appropriate.

Comment

This instruction is properly given if the crossing gates and flashers were operating properly. *Frankenthal v. Grand Trunk Western R. Co.*, 120 Ill.App.3d 409, 458 N.E.2d 530, 76 Ill.Dec. 130 (1st Dist.1983).

However, where automatic gates at a railroad crossing are in an upraised position, or where railroad crossing signals are not operating, under certain circumstances the driver of a motor vehicle approaching the crossing is justified in assuming that no train is at or near the crossing and in proceeding over the crossing on that assumption unless, in the exercise of ordinary care, he should have been aware that a train was in fact in dangerous proximity to the crossing. *Langston v. Chicago & N.W. Ry. Co.*, 398 Ill. 248, 75 N.E.2d 363 (1947); Humbert v. Lowden, 385 Ill. 437, 53 N.E.2d 418 (1944). *See also Dunn v. Baltimore & Ohio R. Co.*, 127 Ill.2d 350, 537 N.E.2d 738, 741-743; 130 Ill.Dec. 409, 412-414 (1989) (absent special circumstances, a train stopped at a crossing is itself adequate notice of its own presence).

Where the railroad's rules required the train to be stopped at crossings on company property and not to proceed until the crossing was protected by a member of the crew, refusal to give this instruction was proper. *Winsor v. Baltimore & O. R.R. Co.*, 92 Ill.App.3d 437, 415 N.E.2d 1141, 47 Ill.Dec. 828 (4th Dist.1980).

73.02 Speed At Which Trains Are Run

The Federal Government, by regulation, has established a speed limit of ____ for the section of track involved in this case. If you find that the Defendant was operating its train at or below this speed limit, then the speed of the train may not be the basis of [negligence] [fault] by the Defendant. If, on the other hand, you find that the train was operating in excess of this speed limit, then you may consider whether the speed of the train was consistent with the exercise of [ordinary care on the part of the Defendant] [the highest degree of care that could have been used in the practical operation of its business as common carrier by the railroad].

Notes on Use

In the last sentence, the second bracket is to be used instead of the first bracket where plaintiff was a passenger on defendant's train.

This instruction should be given only when there is some evidence tending to show that the train was traveling at a speed in excess of the federally prescribed speed limit for that section of track. If there is no evidence which tends to show that the train was traveling in excess of the federally posted speed limit, the speed of the train should not be an issue in the case.

Comment

In *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), the Supreme Court specifically held that under the Federal Railroad Safety Act of 1970, the federal regulations adopted by the Secretary of Transportation pre-empt a state tort claim based upon excessive speed where the speed of the train is below the speed set by the federal regulations promulgated at 49 CFR Sec. 213.9(a) (1992). The Court noted that these regulations set a speed limit for every section of freight or passenger track in the United States based upon the classification of the track.

In *Zook v. Norfolk & Western Railway Company*, 268 Ill. App.3d 157, 642 N.E.2d 1348, 205 Ill. Dec. 231 (1994), the Appellate Court for the Fourth District adopted the Supreme Court's directive in CSX. The Court indicated, however, that a tort law claim is viable where there is evidence that the train's speed was in excess of that set by the federal regulation for that section of track.

73.03 Duty of Railroad To Sound Bell, Whistle, or Horn Before Intersection

There was in force in the State of Illinois at the time of the occurrence in question a statute which provided:

> Every rail carrier shall cause a bell, and a whistle or horn to be placed and kept on each locomotive, and shall cause the same to be rung or sounded by the engineer or fireman, at the distance of at least 1,320 feet, from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or sounding until the highway is reached.

If you decide that the defendant violated the statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether and to what extent, if any, the defendant was negligent before and at the time of the occurrence.

Notes on Use

The paraphrased paragraph, 625 ILCS 5/18c-7402(2) (a) (1994), continues as follows: "[P]rovided that at crossings where the [Illinois Commerce] Commission shall by order direct, only after a hearing has been held to determine the public is reasonably and sufficiently protected, the rail carrier may be excused from giving warning provided by this paragraph."

The Illinois Administrative Code (Title 92, §1535.501 (1985)) provides in part that railroads are excused from giving signals, "at such railroad highway grade crossings which are protected by flashing light signals or flashing light signals combined with short-arm gates that are automatically controlled and operated by means of track circuits or other automatic devices . . . ." This instruction should not be given when §1535.501 of the Administrative Code applies.

Comment

Prior to 1986, the "bell, whistle or horn" statute was codified as Ill. Rev. Stat. ch. 114, &p;59 (1983). Public Act 84-796, effective January 1, 1986, recodified it (with minor changes) as 625 ILCS 5/18c-7402(2) (a) (1994). However, decisions under the prior version should be fully applicable to the current version.

The failure to ring a bell or blow a whistle or horn as required by the statute establishes a prima facie case of negligence. *Randolph v. New York Cent. R. Co.*, 334 Ill.App. 268, 277; 79 N.E.2d 301, 305 (4th Dist.1948); *Hatcher v. New York Cent. R. Co.*, 20 Ill.App.2d 481, 156 N.E.2d 617 (3d Dist.1959) (abstract), *rev'd on other grounds*, 17 Ill.2d 587, 162 N.E.2d 362 (1959). However, the failure to ring a bell or sound a whistle or horn is not *per se* wilful and wanton misconduct. *Robertson v. New York Cent. R. Co.*, 388 Ill. 580, 585; 58 N.E.2d 527, 529 (1944).

In a case involving an Indiana statute very similar in nature to the Illinois statute, the Illinois Appellate Court, First District affirmed a judgment for compensatory damages but reversed an award for punitive damages. The court held that a statutory violation considered to be negligence *per se* would not, alone, necessarily indicate wilful and wanton conduct. The judgment for compensatory damages was affirmed and the award of punitive damages was reversed. *Anderson v. Chesapeake & O. Ry. Co.*, 147 Ill.App.3d 960, 498 N.E.2d 586, 101 Ill.Dec. 262 (1st Dist.1986).