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**Torts—Railroads' Liability at Dangerous Highway Crossings—  
Statutory Construction of That Duty.**

In *Southern Ry. v. Akers Motor Lines, Inc.*<sup>1</sup> the Supreme Court of North Carolina, by its interpretation of a statute, in effect abolished the common-law duty of a railroad to erect, after due notice, any type of warning device or signal at dangerous grade crossings. In *Akers* the plaintiff railway sought damages arising out of a collision between its train and the defendant's tractor-trailer. It based its claim on the alleged negligence of the truck driver in failing to keep a proper lookout when approaching a grade crossing. The defendant motor lines filed a cross action against the plaintiff, basing its claim on the failure of the railroad to maintain gates, gongs or other such safety devices at the crossing which the railroad should have known was dangerous. With respect to the cross action, the judge instructed the jury as to the defendant's contention of negligence on the part of the railroad in failing to maintain warning devices at the crossing. On appeal, the court held it was error to so charge, because the trial court had failed to take notice of the provisions of G.S. § 136-20.<sup>2</sup> The court stated that by the enactment of this statute, the legislature has taken from the railroads all authority and duty to erect safety devices at railroad crossings, and has vested in the State Highway Commission "exclusive discretionary authority . . . to determine when and under what conditions such signalling devices are to be erected and maintained by railroad companies."<sup>3</sup>

The statute involved, G.S. § 136-20, is a comprehensive statute dealing with the safeguarding, and in some cases the elimination, of grade crossings. In essence, this statute provides that where a railroad and a public highway intersect, the Highway Commission, if it feels such crossing is dangerous to the public, has authority to order the railroad to alter the crossing in such a way as to eliminate any dangerous conditions. The costs of such changes are to be appor-

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the doctrine of tort immunity of charitable institutions seems to best represent the rationale of courts that have abolished outmoded common law principles: "We have closed our courtroom doors without legislative help, and we can likewise open them." *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 162, 178, 260 P.2d 765, 774 (1953).

<sup>1</sup> 242 N.C. 676, 89 S.E.2d 392 (1955).

<sup>2</sup> N.C. GEN. STAT. § 136-20 (Supp. 1961).

<sup>3</sup> 242 N.C. at 680, 89 S.E.2d at 394-95. The court admits that this statute works a radical change in the law.

tioned as the Commission may determine. Subsection (f) provides: "The jurisdiction over and control of said grade crossings and safety devices upon the State highway system herein given the Commission shall be exclusive."<sup>4</sup> This subsection was the primary basis for the *Akers* decision. The court interpreted it as taking away all authority of a railroad to erect safety devices at crossings on their own initiative, thereby, in effect, doing away with the common-law duty to maintain necessary safety devices.

G.S. § 136-20 is not a unique statute. There are many other states which have similar, and in some instances almost identical, statutes.

A Minnesota statute, comparable to G.S. § 136-20, also exclusively authorizes the Highway Commission to designate what safety devices are needed at crossings, and to order the railroad to install them.<sup>5</sup> Minnesota was faced with almost the identical problem in *Licha v. Northern Pac. Ry.*<sup>6</sup> that the North Carolina court encountered in *Akers*. In a previous case the court had concluded that their statute was comprehensive and dealt with the entire matter of safety devices at railroad crossings, thus indicating the legislative intent "to occupy the entire field."<sup>7</sup> This decision was overruled by the *Licha* decision.<sup>8</sup> In *Licha*, the plaintiff collided with a train while proceeding across the defendant railway's tracks which, due to the terrain, was a blind crossing. The railroad had complied with the Commission's requirements as to the necessary signs at the crossing; however, the plaintiff alleged that the reflector signs so provided in compliance with the order of the Commission were insufficient, and that the defendant should have placed some other type of warning device commensurate with conditions at the crossing. The railroad took the position that by installing the reflector signs in compliance with the Commission's order, it was absolved of any further duty to give additional warning. In rejecting the railroad's contention, the court recognized its error in the earlier case of *Olson v. Chicago*,

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<sup>4</sup> N.C. GEN. STAT. § 136-20(f) (Supp. 1961).

<sup>5</sup> 15 MINN. STAT. ANN. § 219.24 (1947): "When . . . the commission finds that conditions exist at any grade crossing which in its opinion require any safeguards for the protection of life and property, such as crossing gates or other suitable devices, the commission is authorized to specify the nature of the devices required and to order the railway company operating the railroad at such crossing to install the same."

<sup>6</sup> 201 Minn. 427, 276 N.W. 813 (1937).

<sup>7</sup> *Olson v. Chicago, Great W. Ry.*, 193 Minn. 533, 259 N.W. 70 (1935).

<sup>8</sup> 201 Minn. at 439, 276 N.W. at 819.

*Great W. Ry.*<sup>9</sup> and consequently overruled that prior decision. The court thus held that the exclusive authority of the Commission, given by the statute, to order a railroad to comply should be deemed to be a revocation of a similar authority previously given to municipalities.<sup>10</sup> Thus a railroad must take such precautions in management and operation as public safety requires, even though such precautions may be in addition to those required by statute or order of the Commission. Compliance with the Commission's order was regarded as only the minimum duty of the railroad.<sup>11</sup>

Similarly, Connecticut has a statute, closely paralleling G.S. § 136-20, which gives the Commission power to order warning devices to be installed at railroad crossings which the Commission deems dangerous.<sup>12</sup> In *Pratt, Read & Co. v. New York, N.H. & H.R.R.*<sup>13</sup> the Connecticut court was called upon to determine the effect of the statute. There, the defendant railroad had complied with all the statutes requiring warning signs at railroad crossings. While the statute in question gave the Commission power to order additional automatic signals to be installed, no such order had been given. The plaintiff, who was injured at a blind crossing, alleged that the railroad had a duty to provide additional warning devices even though it had not been so ordered by the Commission. The trial court charged the jury that the railroad was not guilty of negligence as a matter of law for not providing such devices, because the legislature had assumed the regulation of such installation and could order such installation when it deemed it necessary. On appeal, the Connecticut Supreme Court held the instruction erroneous. The court said that merely because those to whom the legislature has delegated the authority of ordering installation of warning devices

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<sup>9</sup> 193 Minn. 533, 259 N.W. 70 (1935).

<sup>10</sup> 201 Minn. at 435, 276 N.W. at 817. Prior to the Minnesota statute, the legislature had authorized municipalities to order railroads to ameliorate dangerous crossings; the court construed the new statute as a revocation of such municipal power, vesting such power exclusively in the Commission.

<sup>11</sup> *Id.* at 435, 276 N.W. at 817; *Blaske v. Northern Pac. Ry.*, 228 Minn. 444, 37 N.W.2d 758 (1949); *Koop v. Great No. Ry.*, 224 Minn. 286, 28 N.W.2d 687 (1947); *Massmann v. Great No. Ry.*, 224 Minn. 170, 282 N.W. 815 (1938); *Munkel v. Chicago, M., St. P. R.R.*, 202 Minn. 306, 278 N.W. 41 (1938).

<sup>12</sup> 3 CONN. GEN. STAT. § 16-159 (1958): "If the Commission upon such hearing finds that public safety requires it, the Commission shall order such company to install and maintain, at such crossings, gates, a flagman or such electric signals or other signal device as may be approved by the commission . . . ."

<sup>13</sup> 102 Conn. 735, 130 Atl. 102 (1925).

at crossings have failed to so order, no presumption can arise, as a matter of law, that reasonable care on the part of the railroad would not require such protection. It is still a question of fact for the jury as to whether or not it was the duty of the railroad to have provided any safeguard.<sup>14</sup>

A parallel Arizona statute gives the Commission the same powers as conferred upon the North Carolina State Highway Commission by G.S. § 136-20.<sup>15</sup> This statute was considered by the Arizona court in *Canon v. Southern Pac. Co.*<sup>16</sup> In that case the plaintiff was driving his truck over the defendant's tracks, following another truck. The lead truck raised so much dust that the plaintiff was unable to see the approaching train. A collision resulted, and the plaintiff sued for damages. As one of the alleged grounds of negligence, the plaintiff contended that the defendant railway failed to maintain a watchman or automatic safety signal at the crossing. The defendant relied upon the absence of an order of the Commission to install any safety device, contending that such absence absolved it from any negligence on that theory as a matter of law. As in the *Licha* and *Pratt* cases, the court rejected this contention, holding that the railroad might still be liable on a theory of negligence in not installing safety devices, even if not ordered to do so by the Commission, if reasonable care would require such warning to be maintained.<sup>17</sup>

If any one conclusion can be deduced from this investigation, it is that no other jurisdiction now regards a statute such as G.S. § 136-20 as abolishing the common-law duty of a railroad at dangerous crossings to use due care toward the travelling public. It appears that North Carolina stands alone in its novel interpretation of the statute as propounded in the *Akers* case.

Without any evidence of the intention of the legislature in regard to this common-law duty in enacting G.S. § 136-20, two possibilities exist: (1) that the legislature did in fact intend to take from the

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<sup>14</sup> *Id.* at 751, 130 Atl. at 107; *Trombly v. New York, N.H. & H.R.R.*, 137 Conn. 465, 78 A.2d 689 (1951); *Markar v. New York, N.H. & H.R.R.*, 77 F.2d 282 (2d Cir. 1935).

<sup>15</sup> 12 ARIZ. REV. STAT. § 40-337 (C) (1956): "The commission shall have the exclusive power to prescribe the character of crossings to be constructed and maintained by railroads where their lines cross public roads or streets of a town or city."

<sup>16</sup> 52 Ariz. 245, 80 P.2d 397 (1938).

<sup>17</sup> *Id.* at 253, 80 P.2d at 401; *Southern Pac. R.R. v. Mitchell*, 80 Ariz. 50, 292 P.2d 827 (1956).

railroads all duty and authority to erect safety devices at crossings, vesting such duty and authority exclusively in the Highway Commission; or, (2) that the legislature never intended to delimit the railroads' common-law duties with regard to dangerous crossings, and that the court in *Akers* misinterpreted G.S. § 136-20.

The North Carolina statute is almost identical to statutes of numerous other states. In not one of those states has it been interpreted as an intention on the part of the legislature to absolve a railroad of any of its common-law duties. The possibility that North Carolina, by the enactment of so similar a statute, intended to exempt railroads from any common-law duty is, therefore, remote.

If the legislature never intended to abolish the railroads' common-law duties at dangerous crossings, it follows that the North Carolina Supreme Court misinterpreted G.S. § 136-20, and that the rule laid down in the *Akers* decision is erroneous. In particular, the court construed subsection (f) as vesting exclusive authority in the Highway Commission to determine when and where safety devices are to be constructed, thus relieving the railroad of all authority to erect such devices on their own. Apparently the words "herein given the Commission" were forgotten by the court when it interpreted subsection (f). These words would seem to delegate to the Commission the *sole authority to order* construction, reparation, and maintenance of facilities at grade crossings, to the exclusion of like authority being exercised by municipalities, counties, or other state agencies.<sup>18</sup> The only agency authorized to exercise the powers "herein given the Commission" is the Highway Commission itself, the only purpose of subsection (f) being to delegate to a single agency the power to order the railroad to erect such safety devices if it deems such action necessary for the protection of the public. If this is the correct interpretation of G.S. § 136-20, it should not in any way be construed as a bar to a railroad's erecting its own safety devices or an abolition of the railroad's common-law duties to the public.

The *Akers* decision is the only occasion in which the court has had to apply its interpretation of G.S. § 136-20. The apparent result of the decision is to leave the injured plaintiff with no recourse

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<sup>18</sup> Prior to the enactment of G.S. § 136-20, such authority was frequently exercised in North Carolina by municipalities through powers given in their charters and by ordinances. See *City of Durham v. Southern Ry.*, 185 N.C. 240, 177 S.E. 17 (1924); *Atlantic Coast Line R.R. v. City of Goldsboro*, 155 N.C. 356, 71 S.E. 514 (1914).

against the railroad when the sole basis of his action is failure of the railroad to provide safety devices which have not been prescribed by the Highway Commission. Such a result appears to be entirely inconsistent with the rule laid down in other states which have similar statutes.<sup>19</sup>

If the legislature did not intend to abolish the railroads' common-law duties to erect safety devices at dangerous crossings, the best possible remedy to the problem would be an amendment to G.S. § 136-20 by the legislature. It should specify that nothing in G.S. § 136-20 should be construed to absolve a railroad from any common-law duty to the public, whether or not any action has been taken by the Highway Commission under the powers granted by G.S. § 136-20.

ARCH K. SCHÖCH IV

### Torts—Res Ipsa Loquitur—Doctrine of Exclusive Control of the Instrumentality

The doctrine of *res ipsa loquitur* is a rule of evidence applied where, under the circumstances of the case, the mere fact that the accident occurred is of itself circumstantial evidence of negligence on the part of someone.<sup>1</sup> In application of the doctrine to actual fact situations the courts have developed certain "elements" which might be termed conditions precedent to its invocation. These elements

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<sup>19</sup> 57 CAL. PUB. UTIL. CODE § 1202, *Pennington v. Southern Pac. Co.*, 146 Cal. App. 2d 605, 304 P.2d 22 (1956); *Jenson v. Southern Pac. Co.*, 129 Cal. App. 2d 67, 276 P.2d 703 (1954); *Lloyd v. Southern Pac. Co.*, 111 Cal. App. 2d 626, 245 P.2d 583 (1952); ILL. ANN. STAT. 111½ § 62 (1954), *Baltimore & O.R.R. v. Felgenhauer*, 168 F.2d 12 (8th Cir. 1948); *Bales v. Pennsylvania R.R.*, 347 Ill. App. 466, 107 N.E.2d 179 (1952); *Lauer v. Elgin, J. & E. Ry.*, 305 Ill. App. 200, 27 N.E.2d 315 (1940); *Willett v. Baltimore & O.S.W.R.R.*, 284 Ill. App. 307, 1 N.E.2d 748 (1936); *Wagner v. Toledo, P. & W.R.R.*, 352 Ill. 85, 185 N.E. 236 (1933); 5 MASS. GEN. LAWS ANN. ch. 160, § 147 (1959), *Peterson v. Boston & M.R.R.*, 310 Mass. 45, 36 N.E.2d 701 (1941); *Mannino v. Boston & M.R.R.*, 300 Mass. 71, 14 N.E.2d 122 (1938); *Hubbard v. Boston & A.R.R.*, 162 Mass. 132, 38 N.E.2d 366 (1894); 49 OHIO REV. CODE ANN. § 4907.47 (Supp. 1961), *Evans v. Erie R.R.*, 213 Fed. 129 (6th Cir. 1914); 17 OKLA. STAT. ANN. § 84 (1951), *Slowik v. Chicago, M., St. P. & Pac. R.R.*, 89 F. Supp. 590 (D. Minn. 1950); *Kansas City So. Ry. v. State*, 195 Okl. 424, 158 P.2d 699 (1945); *St. Louis-S.F. Ry. v. Prince*, 145 Okl. 194, 291 Pac. 973 (1930).

<sup>1</sup> The Latin phrase "*res ipsa loquitur*" means "the thing speaks for itself." It was first used in *Byrne v. Boadle*, 2 Hurl. & C. 722, 159 Eng. Rep. 299 (Exch. 1863), although the idea that negligence could be proven by circumstantial evidence had existed prior to that time. PROSSER, TORTS § 42, at 201 (2d ed. 1955).