Proof of Negligence in North Carolina Part II -- Similar Occurrences and Violation of Statute

Robert G. Byrd

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol48/iss4/2

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
PROOF OF NEGLIGENCE IN NORTH CAROLINA†

PART II. SIMILAR OCCURRENCES AND VIOLATION
OF STATUTE

Robert G. Byrd*

THE SIMILAR-INSTANCES RULE IN FOOD AND BEVERAGE CASES

Basis for the Rule

The North Carolina Supreme Court has consistently held that the
explosion of a bottle of carbonated beverage or the presence of a foreign
substance in food or beverage is insufficient evidence of negligence for
submission to the jury and has rejected the application of res ipsa loquitur
to such occurrences.¹ The court, however, has developed a unique doc-
trine under which proof of such an occurrence, together with evidence of
similar occurrences, permits an inference of defendant's negligence:

[W]hen the plaintiff has offered evidence tending to show that like
products filled by the same bottler under substantially similar conditions,
and sold by the bottler at about the same time have exploded, there is
sufficient evidence to carry the case to the jury, as such facts and cir-
cumstances permit the inference that the bottler had not exercised that
degree of care required of him under the circumstances.²

This doctrine is commonly referred to as the similar-instances rule.

The rationale for the rule is less than clear. In some cases the court
has reasoned that "evidence of the occurrence of similar events is probative
on an issue... whether a like occurrence happened at another time" since
"the observed uniformity of nature raises an inference that like causes
will produce like results..."³ This language suggests that defendant's

¹ Part I of this article, Res Ipsa Loquitur, appears in the preceding issue of
this volume, 48 N.C.L. Rev. 452. The article was prepared in cooperation with the
North Carolina Law Center.

² Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 154 S.E.2d 337 (1967);
Manning v. Harvey C. Hines Co., 218 N.C. 779, 10 S.E.2d 727 (1940); Evans v.
Charlotte Pepsi-Cola Bottling Co., 216 N.C. 716, 6 S.E.2d 510 (1940); McCarn v.
Gastonia 3-Centa Bottling Co., 213 N.C. 543, 196 S.E. 837 (1938); Blackwell

³ Styers v. Winston Coca-Cola Bottling Co., 239 N.C. 504, 508, 80 S.E.2d 253,
256 (1954).

⁴ Perry v. Kelford Coca-Cola Bottling Co., 196 N.C. 690, 691, 146 S.E. 805
(1929).
negligence has been established as the cause of the other occurrences and that their similarity to the present happening permits an inference that defendant’s negligence also caused it. Such facts, however, are inconsistent with the proof presented in cases in which the rule has been applied since the ultimate cause of any of the occurrences is not usually identified. Another rationale sometimes used by the court is that the combined occurrences, including the event that caused plaintiff’s injuries, point to defendant’s negligence as their likely cause. Thus, the court, unwilling to infer negligence from one such unexplained occurrence, finds in a number of similar events a sufficient basis for such an inference.

The court has not required that any specific number of similar instances be shown before the rule can be invoked. That a permissible inference of defendant’s negligence arises upon proof of two or more occurrences seems to have been assumed. Whether a prima facie case can be established by proof of nothing more than a single similar instance is uncertain. Although three decisions have upheld submission of a case to the jury when one other similar occurrence had been shown, their authority is doubtful. In none of them was this issue expressly raised, and the court in a recent case, Jenkins v. Harvey C. Hines Co., apparently did not consider them to be binding.

Jenkins leaves the impression that the court will not adopt any general rule that determines in all cases the sufficiency of proof of only one similar instance: “In our opinion, whether a case should be submitted to the jury should not depend solely upon whether there is evidence of only one or of more than one ‘similar instance.’ Depending upon the circumstances, one such instance may well be of greater significance than two or more others.” In any event, the one similar instance is a “significant evidential circumstance” to be considered with other evidence in determining whether the case should go to the jury.

---


6 264 N.C. 83, 141 S.E.2d 1 (1965). This case involved an exploding bottle while the earlier cases involved foreign substances in products. Although the court recognized this factual difference, its decision was not based on it.

7 Id. at 88, 141 S.E.2d at 4.

8 Id.
Whether in *Jenkins* the evidence other than that of the similar instance significantly strengthened the plaintiff's proof is debatable. On the basis of the additional evidence the court concluded that the pressure in the bottle of carbonated beverage apparently was not abnormally high and that "it would seem reasonable to infer that the explosion occurred on account of a defect in the bottle." The court did not consider the sufficiency of this evidence to show the defendant's negligence either in using defective bottles or in failing to inspect to discover defective bottles. The evidence that narrowed the cause of the explosion to a defective bottle does not seem to have made more likely an inference of the defendant's negligence since it failed to establish the defendant's responsibility for the defective bottle. However, once careful handling of the bottle from the time it left the defendant's control until the time of the accident was shown, a reasonable inference might have been drawn that either of the two causes considered by the court—defective bottle and excessive pressure—existed as a result of the defendant's negligence.

**Procedural Effect**

The inference based upon proof of similar instances indicates, usually without identifying any specific acts, that some negligence of defendant likely caused the accident. It is sufficient to take the case to the jury and to support a finding of negligence. The jury is free to accept or reject the inference and should find for plaintiff only if convinced that he has established defendant's negligence as the cause of his injuries. The inference is not displaced when defendant introduces evidence of due care, such as the use of modern machinery, the making of extensive inspections, and the adoption of generally approved methods of operation. When such evidence is introduced, the jury considers it together

---

8 *Id.* at 89, 141 S.E.2d at 5.
with all other evidence in determining whether defendant was negligent.\textsuperscript{14} Defendant's evidence that like products made by other manufacturers sometimes explode or contain foreign substances does not destroy the inference.\textsuperscript{15}

\textit{Similarity of Manufacturing Conditions and Time of Sale}

Proof of another occurrence is admissible only when it is similar to the one that caused plaintiff's injury. To establish that the occurrences were similar, plaintiff's evidence must show (1) that the products involved in both were manufactured by defendant under substantially similar conditions and were sold by him at about the same time,\textsuperscript{16} and (2) that the mishaps involving these products occurred under substantially similar circumstances and within a reasonable time of each other.\textsuperscript{17}

Failure to show that the products involved in the other occurrences were manufactured by defendant has occasionally been fatal to plaintiff's claim,\textsuperscript{18} and the absence of evidence of substantial similarity of production conditions or of proximity of time of sale by the manufacturer has been decisive in a few cases.\textsuperscript{19} In many cases, however, minimal proof of the similarity of manufacturing conditions and proximity of time of sale has been routinely accepted,\textsuperscript{20} or the need for such proof has not even been noted.\textsuperscript{21} This view is sound.

Implicit in the time-of-manufacture requirement seems to be the premise that isolated mishaps, even if the products involved were man-

\begin{itemize}
\item \textsuperscript{14} Styers v. Winston Coca-Cola Bottling Co., 239 N.C 504, 80 S.E.2d 253 (1954); Grant v. Graham Chero-Cola Bottling Co., 176 N.C. 256, 97 S.E. 27 (1918).
\item \textsuperscript{15} Grant v. Graham Chero-Cola Bottling Co., 176 N.C. 256, 97 S.E. 27 (1918).
\item \textsuperscript{16} Styers v. Winston Coca-Cola Bottling Co., 239 N.C. 504, 80 S.E.2d 253 (1954).
\item \textsuperscript{17} Graham v. Winston Coca-Cola Bottling Co., 257 N.C. 188, 125 S.E.2d 429 (1962).
\item \textsuperscript{18} Elledge v. Pepsi-Cola Bottling Co., 252 N.C. 337, 113 S.E.2d 435 (1960); Thompson v. Dr. Pepper Bottlers Corp., 217 N.C. 795, 8 S.E.2d 234 (1940); Keith v. Liggett & Myers Tobacco Co., 207 N.C. 645, 178 S.E. 90 (1935).
\item \textsuperscript{19} E.g., Collins v. Lumberton Coca-Cola Bottling Co., 209 N.C. 821, 184 S.E. 834 (1936).
\item \textsuperscript{20} Davis v. Coca-Cola Bottling Co., 228 N.C. 32, 44 S.E.2d 337 (1947); Caudle v. F.M. Bohannon Tobacco Co., 220 N.C. 105, 16 S.E.2d 680 (1941); Dry v. Charlotte Coca-Cola Bottling Co., 204 N.C. 222, 167 S.E. 801 (1933); Dail v. Taylor, 151 N.C. 284, 66 S.E. 135 (1909). \textit{See also} cases cited notes 39 & 40 \textit{infra}.
\end{itemize}
factured under similar conditions, do not support an inference of the manufacturer's negligence. To the extent that such a safeguard is necessary, it is adequately met by proof of the time of purchase from the retailer or of the time of the occurrence itself. The requirement of substantially similar manufacturing conditions is apparently based on the view that, when such conditions remain constant, they, more than other possible causes, are the likely source of trouble. Although proof of careful handling of the product from the time it left the manufacturer's possession would seem to meet this objective, the court has not recognized this possibility. Insistence upon strict proof of this requirement is objectionable since significant changes in processes of production occur infrequently and since knowledge of these processes is peculiarly available to the manufacturer.

Similarity of Circumstances of the Occurrences

The requirement that the circumstances surrounding the other occurrences be substantially similar to those of the mishap that injured the plaintiff has been the one principally relied on by the court. Application of this requirement is illustrated by decisions in which dissimilarity was found between an occurrence involving Coca Cola and one involving ginger ale although both had been manufactured by the defendant and between the explosion of a bottle caused by the impact of its fall from a shelf and other explosions in which no impact had occurred. In these instances, because of the different circumstances, no reasonable connection exists between the event in which plaintiff was injured and the other occurrences.

Many differences in the circumstances surrounding the other occurrences and those surrounding plaintiff's injury may exist, and a sufficient connection between the events may still be found to hold the other occurrences to be similar. Occasionally, as in Enloe v. Charlotte Coca-Cola Bottling Co., the court fails to recognize this possibility. In Enloe the plaintiff's injury was caused by the presence of a mouse in a bottle of soft drink, and evidence of occurrences in which glass was found in other bottles was excluded because "particles of glass [are] suggestive of

25 Cases cited notes 28-36 infra.
26 208 N.C. 305, 180 S.E. 582 (1935).
a dissimilar, rather than a similar, source of deleteriousness . . . ."26 The crucial fact that connects these occurrences is that some foreign substance was found in the defendant's bottled drinks on each occasion, and the significance of this fact is diminished only slightly, if at all, because different foreign substances were involved in the occurrences.

The court has adopted a liberal view of what constitutes "substantially similar circumstances" in the vast majority of cases.27 When the plaintiff was injured by the explosion of a bottle as it was removed from a crate, occurrences in which the neck of a bottle broke off as the crown was pried off and in which a bottle exploded while being taken from an icebox were held similar.28 Explosions of bottles being placed in or removed from iceboxes or crates were found similar to the explosion that injured the plaintiff although the injury occurred after the bottled drink had been removed from outdoors in the hot sun to indoors.29 Finally, explosions of bottles while in the manufacturing process, while being crated, loaded on trucks, and hauled to retailers, and when in the hands of consumers were all apparently treated as similar to the explosion of a bottle in an icebox.30

The same leniency appears in decisions where injury was caused by a foreign substance in food or beverage. The following have been held to be similar: a fishhook to what appeared to be a rat's claw or squirrel's foot;31 a fishhook to "some other foreign substance";32 glass to a stick;33 oil and glass to a chew of tobacco, a fly, and paper and trash;34 glass to grit;35 a "dirty oily-looking substance" to bits of glass and a spider.36

The above examples show that the court is not inclined, except in occasional cases, to make fine factual distinctions in applying the similar-instances rule. This approach is sound and should be continued. Although great disparity seems to exist between the explosion of a bottle held

---

26 Id. at 309, 180 S.E.2d at 584.
PROOF OF NEGLIGENCE

in one's hand and the explosion of bottles handled roughly while being loaded or hauled in trucks, both situations constitute normal handling that must be anticipated by the manufacturer. In none of the occurrences has another cause intervened to shift the responsibility from the defendant.

To be admissible in evidence the other occurrences must have happened within a reasonable time of the plaintiff's injury. Similar incidents before and after the date of plaintiff's injury may be shown. Reasonable proximity in time has been found when the occurrences were separated by months and, in several cases, by almost two years. In only a few cases has the court excluded evidence of other occurrences because of their remoteness in time.

Evaluation of the Similar-Instances Rule

Serious questions must be raised whether the inference of negligence under the similar-instances rule is actually based upon the cumulative effect of a number of similar mishaps involving defendant's products. Except for the requirement of proof of other occurrences, the basis for and operation of the inference is identical to that under the doctrine of res ipsa loquitur. Further, the court's view of what constitutes similar instances can be justified only by dismissing differing or additional factors that are present in the other occurrences as unlikely causes of the accident or as circumstances that defendant was required to anticipate. Solely in this way can the responsibility for the other occurrences be placed upon him. Since this reasoning, when applied only to the event that injured plaintiff, equally points to defendant's responsibility, the requirement of proof of other occurrences seems unnecessary.

Any foundation for the similar-instances rule other than the one on which res ipsa loquitur is based is difficult to find. Cases involving exploding bottles and foreign substances in food and drink are dis-
tiguous from other situations in which similar occurrences are relied on to aid in establishing defendant's liability. A series of closely connected events may reasonably indicate that a particular machine or place is dangerous or, if a defect is established, permit an inference of defendant's knowledge of it. In such cases there is a logical connection between the other occurrences and the limited fact to be inferred from them. For example, successive injuries within a short time to employees operating a particular machine may permit an inference that the machine was dangerous and that the employer had knowledge of its dangerous nature. If the duty of reasonable care requires the employer to provide safe machinery to its employees or to warn them of dangers in its operation, a basis for holding the employer liable exists.

Such a logical connection is less readily apparent in the food and beverage cases in which the inference to be drawn is that defendant has somehow been negligent, but no particular condition or method of operation is indicated. If, as the court said in one case, "negligence is not established by showing that one bottle out of 8 million [defendant's monthly production] contained a deleterious substance," it is difficult to perceive why proof that three bottles, out of a yearly output of eighty to one hundred million, contained deleterious matter furnishes any better basis for an inference of defendant's negligence.

These observations are not intended as criticism of the way in which the court applies the similar-instances rule. On the contrary, if proof of other occurrences is to be required, support for the court's position is given. The purpose of this discussion is to suggest that the similar-instances rule is basically a cautious application of res ipsa loquitur and that the safeguards, if any, that are sought by requiring proof of other occurrences are unclear. Diligent investigation will likely disclose other similar occurrences, and, when such evidence is missing, the rule operates to penalize the injured party whose attorney has not made a careful search. The fear of fabricated claims is always a poor justification for denial of legitimate ones. The idea that the proof of other similar incidents gives authenticity to plaintiff's claim is no more plausible than the equally common suggestion that the effect of such a requirement is to

---

42 See discussion at pp. 739-41 infra.
produce two liars rather than one if the claimant is in fact asserting a false claim. The court should abandon the similar-instances rule and, in the situations in which it has been used, apply *res ipsa loquitur* instead.

**Similar Occurrences in Other Situations**

In a variety of other situations proof of similar occurrences may be offered to aid in establishing defendant's negligence. Although in these situations the evidence of similar instances may be an important part of plaintiff's proof, such evidence seldom constitutes his entire case.\(^4^5\)

Proof of similar occurrences usually does not support an inference of general negligence but tends only to establish facts, such as the existence of a dangerous condition or of defendant's knowledge of this danger, that permit a finding of specific negligence.\(^4^6\)

In these situations, unlike those in which food and beverages are involved, proof of similar instances does not as a matter of law require submission of a case to the jury. The probative force of such evidence depends upon the circumstances of a particular case and upon the duty imposed on defendant under those circumstances. The evidence of similar occurrences may establish a prima facie case of negligence\(^4^7\) or merely combine with other proof towards accumulating a preponderance of the evidence.\(^4^8\) Often such evidence is directed to only one of several elements that must be proved to establish defendant's liability.\(^4^9\)

Both the admissibility and weight of evidence of similar occurrences

\(^{45}\) *E.g.*, Pickett v. Carolina & Nw. Ry., 200 N.C. 750, 158 S.E. 398 (1931) (condition of bridge at time of plaintiff's injury was some evidence that it was negligently maintained; similar occurrences strengthened this showing); Wallace v. Railroad, 141 N.C. 646, 54 S.E. 399 (1906) (defect shown; other occurrences established notice to defendant that plaintiff would be exposed to it).

\(^{46}\) *E.g.*, Dockery v. World of Mirth Shows, Inc., 264 N.C. 406, 142 S.E.2d 29 (1965) (defect in safety bar on carnival ride and attendant's failure to latch the bar); Southerland v. Atlantic Coast Line R.R., 158 N.C. 327, 74 S.E. 102 (1912) (unreasonable delay in shipment of goods); Raper v. Wilmington & W.R.R., 126 N.C. 563, 36 S.E. 115 (1900) (particular way in which railroad crossing was constructed was unsafe).


\(^{49}\) Spittle v. Charlotte Elec. R.R., 175 N.C. 497, 95 S.E. 910 (1918) (distance at which approach of fire truck could be heard); Pritchett v. Southern Ry., 157 N.C. 88, 72 S.E. 828 (1911) (defendant's knowledge of a dangerous condition); Whitehurst v. Atlantic Coast Line R.R., 146 N.C. 588, 60 S.E. 648 (1908) (distance from right of way that cinders emitted from defendant's engine had fallen).
are governed by normal rules of evidence. Nothing more is involved than an inference of one fact from other facts that have been established; whether the inference will be permitted depends largely upon the logical connection between the two. Thus, proof that three cars successively slid out of control on the surface of a road under repair permits an inference that the surface was slippery. If other proof shows that inadequate warning of this danger had been given, the evidence may be sufficient to establish the defendant's liability.

Uses of Similar Occurrences as Proof

A series of occurrences involving a particular machine or piece of equipment may indicate that it is defective and thus furnish a basis for finding defendant's negligence. Although the existence of a defect may not be found from a bare showing that other injuries have been caused by the same instrumentality, proof that plaintiff's injury was caused by the faulty operation of the instrumentality and that on other occasions it had operated in a similar way may well provide a basis for finding such a defect. Thus, when the safety bar on a carnival ride failed to latch properly for several riders on the same day, when a train engine emitted sparks on other occasions as well as at the time of the fire that caused the plaintiff's injury, or when normal use caused pieces of steel to fly from chisels provided by the defendant, a reasonable inference can be drawn that the instrumentality involved was defective.

Similar occurrences either alone or in conjunction with other evidence may be sufficient to establish the existence of a dangerous place or condition. The occurrence of similar accidents at other railroad crossings constructed in much the same way as the one at which the plaintiff was injured or at the same bridge where the plaintiff's accident occurred

---

52 Id.
may be considered with evidence of the condition of the crossing or bridge at the time of his injury to establish that these places were dangerous. The circumstances of an accident may provide some evidence of defendant's negligence by showing that plaintiff was required to work in a close space that exposed him to moving machinery or flying metal chips. In such instances, evidence of prior similar occurrences provides further proof that the place was unsafe and also tends to establish defendant's knowledge of the danger.

Similar occurrences may also be used to show the absence of a dangerous condition. When a customer slips and falls on the floor of a business, proof by the proprietor that a large number of other customers had walked over the same area without falling is some evidence that the floor was not negligently maintained. If plaintiff has introduced sufficient evidence of negligence for submission to the jury, such proof by defendant merely becomes a part of the total evidentiary picture to be considered by the jury.

Ordinarily, before liability attaches, the evidence must show not only a defective place or condition but also a reasonable opportunity for defendant to have discovered and corrected it. Defendant's knowledge may be shown by proof of earlier mishaps, involving the same defect, of which he was likely to learn in the normal course of events. Upon somewhat similar reasoning, the existence in a street of defects other than the one causing injury to plaintiff, or the defective condition of a sidewalk beyond the immediate place where plaintiff was injured, may constitute sufficient notice to defendant.

Proof of other occurrences may be directed to the issue of causation as well as of negligence. That defendant's train engine had set fires at other places may permit an inference that it caused the fire that was

---

61 Cases cited note 60 supra.
63 Cases cited note 62 supra.
discovered on plaintiff's property shortly after the engine had passed. Other occurrences may also be used to show the absence of a causal connection between defendant's conduct and plaintiff's injury. Thus, proof that plaintiff's property had been flooded on several occasions before the erection of defendant's dam may show that the dam was not the cause of the flooding that damaged plaintiff's property.

A variety of other facts, such as the tendency of actions or things to frighten animals, what constitutes a reasonable time for shipment between two points, the distance at which the approach of a fire truck could be heard, and other circumstances, may be established by proof of similar occurrences. In Dockery v. World of Mirth Shows, Inc. the court held that the testimony of several patrons of a carnival ride that the attendant failed to latch the safety bar after they were seated in the ride was admissible to show "a continuously negligent method of operation."

**Limitations on Proof of Other Occurrences**

"As a general rule evidence of other accidents or occurrences is not competent and should not be admitted." When the probative value of such evidence is slight, the possibility of prejudice, surprise, or undue complication of the trial may well justify its exclusion. The court, in recognizing exceptions to this exclusionary rule, has required proof of substantial identity of circumstances and reasonable proximity of time as a prerequisite to the admission of evidence of similar occurrences. When such facts are not shown, the evidence of similar instances is excluded.

---

69 Chaffin v. Manufacturing Co., 135 N.C. 95, 47 S.E. 226 (1904).
71 Southerland v. Atlantic Coast Line R.R., 158 N.C. 327, 74 S.E. 102 (1912).
73 Simpson v. American Oil Co., 219 N.C. 595, 14 S.E.2d 638 (1941) (that insecticide was poisonous); Aydlett v. Carolina By-Products Co., 215 N.C. 700, 2 S.E.2d 881 (1939) (that odors emitted by defendant's plant constituted "annoyance"); Wallace v. Railroad, 141 N.C. 646, 54 S.E. 399 (1906) (that employee would use particular part of premises).
75 Id. at 415, 142 S.E.2d at 36.
Although these limitations are the same as those identified with the application of the similar-instances rule, the court seems more demanding of proof of the substantial similarity of the occurrences in cases in which defects in food and beverages are not involved. This difference is justified. The inference of negligence under the similar-instances rule applied in food and beverage cases arises from the nature of the occurrence itself; proof of similar incidents is mostly for a corroborative purpose. In the cases now under consideration the inference of the fact sought to be proved is based upon the several occurrences, and the strength of that inference depends largely upon their similarity.

The degree of similarity to be shown may depend upon the fact to be proved, and the same identity of circumstances may not be required, for example, to impute knowledge to the defendant as that needed to show a defective or dangerous condition. The court at times has failed to recognize this distinction and has excluded evidence of similar occurrences when it seemed sufficient to establish defendant’s responsibility for a defect that had been identified as the cause of plaintiff’s injury. For example, in Grant v. Raleigh & Gastonia Railroad Co.,\(^7\) when a train left the main track because a bolt was missing from the switching mechanism, entered a side track, and collided with cars parked there, the court excluded evidence of the general state of disrepair of the track in the area of the accident. Since the evidence showed that the collision was caused by a specific defect, the crucial question was whether responsibility for it could be charged to the defendant. That the defective switch was due to the defendant’s negligence seems probable under these circumstances since both inadequate maintenance and inspection are indicated. Even if a failure to inspect cannot be found, the inference that the defect
was caused by the defendant's negligence remains the more likely one because the possibility of an unavoidable accident or deliberate tampering by strangers seems remote.

Violation of Statute

Basis for the Rule

All jurisdictions, including North Carolina, hold that proof of the violation of a statute intended for the protection of persons or property constitutes negligence or some evidence of it. Usually, the probative force of such proof in establishing negligence is not derived from any express provision in the statute, but exists because courts have chosen to give it this effect and have presumed or implied an intention on the part of the legislature to establish a standard of civil liability.

It may be doubted whether a legislature in enacting a criminal statute has any intent to establish rules for determining civil liability, but the judicial interpretation is now well-established, and debate about the point is useless.

The direct approach to the problem taken by the North Carolina Supreme Court has generated little discussion of what the legislature may or may not have intended in regard to civil liability. The court has simply stated: "Negligence is a failure to perform some duty imposed by law. It may be the breach of the duty imposed by some statute designed or intended to protect life or property." The duty imposed by the legislature is held to be an absolute one, and "[t]he violator is liable if injury or damage results, irrespective of how careful or prudent he has been in other respects. No person is at liberty to adopt other methods and precautions which in his opinion are equally or more efficacious to avoid injury."

Some North Carolina decisions indicate that the breach of a statutory duty constitutes a separate tort and suggest that a defendant, who has

---

80 Clinkscales v. Carver, 22 Cal. 2d 72, 136 P.2d 777 (1943).
85 E.g., Stone v. Texas Co., 180 N.C. 546, 553-54, 105 S.E. 425, 429 (1920):
violated a safety statute, should be liable for consequences beyond those for which compensation can be recovered in a negligence action. However, the concept of more extensive liability for breach of statutory duty never gained a significant foothold and now seems to have been abandoned altogether. The court’s later response to the idea of extended liability is indicated in *Aldridge v. Hasty*.

Strictly speaking, a violation of a criminal statute constitutes a positive, affirmative tort which perhaps should never have been put in the category of negligence. It would seem that this viewpoint prevails in some jurisdictions where it is held that foreseeability is not a condition of liability. In these jurisdictions the rule that the tort-feasor is liable for any consequence that may flow from his unlawful act as a natural and probable (or proximate) result thereof, whether he could foresee or anticipate it or not, prevails. It is presumed that he intended whatever resulted from his unlawful act. . . .

In the past this rule has received the sanction of this Court by direct decision as well as by way of *obiter dicta*. . . .

But the trend of our decisions since the advent of the automobile has been to treat a breach of a criminal law as an act of negligence *per se* unless otherwise provided in the statute. . . .

. . . .

When the action is for damages resulting from the violation of a [statute], does the doctrine of foreseeability apply? We are constrained to answer in the affirmative.

While it may not be strictly accurate to speak of the breach of a duty arising out of a violation of a statutory duty as negligence . . . it is generally so treated . . . . For practical purposes, it may properly be a convenient mode of administering the right, because it involves the question of proximate cause and contributory negligence. . . . [W]hen there is a violation of a statute or ordinance, especially one . . . which so deeply concerns public and individual safety, both as to person and property, it is an illegal act, which, of itself, is a tort, without reference to the question of negligence. . . .

---


87 Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966) (charge that permitted recovery upon finding that statutory violation was actual cause of injury held erroneous); McNair v. Richardson, 244 N.C. 65, 92 S.E.2d 459 (1956) (charge that foreseeability was unnecessary if defendant’s act was unlawful held erroneous); Woods v. Freeman, 213 N.C. 314, 195 S.E. 812 (1938) (omission of proximate cause in charge held erroneous).

88 240 N.C. 353, 82 S.E.2d 331 (1954).

89 Id. at 358-59, 82 S.E.2d at 337-38.
Without the existence of any legislative enactment, many acts and omissions proscribed by statute would constitute negligence. Further, even if no special force were given to proof of the violation of a statute, the existence of a statute that reflects community experience and expectation would have obvious importance in the determination of what constitutes reasonable care. Thus a rule that gives effect to evidence of the violation of a statute as proof of negligence is not an arbitrary one, regardless of whether it is based upon a presumption of legislative intent or the finding of a legislative standard. However, the view that there is a legislative purpose to affect civil liability does give added significance to the statutory violation. Under this viewpoint, proof of the violation of a statute establishes prima facie or per se negligence. Such proof in the first instance takes from the judge the determination of the sufficiency of the evidence for submission to the jury and, in the latter instance, if the jury finds the evidence of a statutory violation credible, takes from it the ultimate determination of defendant's negligence. Nevertheless, this view does not limit inquiry simply to whether a statute has been violated since courts have developed a body of law relating to legislative purpose, excusable violations, and other matters that usually permit full consideration of the circumstances surrounding the alleged statutory violation.

The North Carolina court, in holding that the violation of a statute is negligence per se, has emphasized that the statute was intended to protect life and property and, presumably, would hold differently if a safety statute was not involved. Only criminal statutes have been involved in the cases, but the rule has been applied to a criminal statute even though its violation was punishable by imprisonment or subjected violators to a civil penalty. Whether the rule applies to a failure to

---

82 See discussion at pp. 752-53 infra.
84 Miller v. Miller, 273 N.C. 228, 231, 160 S.E.2d 65, 68 (1968) ("It appears, therefore, that the seat belt enactments are not absolute safety measures and that no statutory duty to use the belts can be implied from them."); Brewer v. Carolina Coach Co., 253 N.C. 237, 116 S.E.2d 725 (1960) (tort action cannot be predicated merely upon perjury and subornation of perjury in violation of a criminal statute).
comply with specific duties, either for the benefit of individuals or the public, imposed by a statute that creates no criminal offense apparently has not been decided. Although there is broad language in some cases that seems to encompass this latter situation, the court in one case held that noncompliance with an administrative regulation did not constitute negligence per se and based its holding in part upon the absence of any criminal penalty for violation of the regulation. However, since an administrative regulation and a statute do not stand on the same footing, the decision is not necessarily controlling. This problem may have little practical significance since most safety statutes impose a criminal penalty and since section 14-4 of the North Carolina General Statutes makes the violation of a municipal ordinance a misdemeanor.

Most of the North Carolina cases have involved statutes governing the operation of motor vehicles. Although the high incidence of appearance of traffic laws in the cases is chiefly due to the large volume of automobile-accident litigation, another reason may be the unfamiliarity of attorneys with the statutory law in other areas. The violation of a variety of statutes, other than those concerning the operation of automobiles, may permit the negligence-per-se rule to be invoked. It has been applied in cases involving the violation of statutes regulating the operation of railroads, the storage and handling of gasoline, the maintenance of com-

---

96 Id. at 63, 84 S.E.2d at 275 (“Violation of a statute, or ordinance of a city or town . . . is negligence per se . . . This is the rule generally as to statutes enacted for the safety and protection of the public; a fortiori, when such violation in itself is a criminal offense.”); Norfleet v. Hall, 204 N.C. 573, 169 S.E. 143 (1933).
commercial swimming pools, the employment of minors, the construction of buildings, the safeguarding of fires, and other activities.

In some jurisdictions a distinction is made between state statutes and enactments of lesser legislative bodies, and the violation of a municipal ordinance or of an administrative regulation is held to be evidence of negligence only. Acceptance of this distinction probably represents a desire to recognize, on the one hand, that the violation of an ordinance or regulation may be significant to the determination of negligence and, on the other hand, to leave its significance to the jury in order that all relevant circumstances may be considered. These circumstances may include not only the facts surrounding the violation but also, at least sub silentio, the limited jurisdiction of the agency that enacted the rule, the quality of its members, and the relative significance of the rule that was violated.

The North Carolina court, however, holds that the violation of a municipal ordinance or of an administrative regulation that is given the force and effect of law by the legislature is negligence per se. A violation of a professional or industrial code incorporated by reference into the rules of a regulatory agency has been given the same effect. In Swaney v. Peden Steel Co., the negligence per se rule was not applied to a regulation of the state labor department because the court found that the legislature had not intended it to have the force and effect of law. The basis for this finding was that the statute under which the regulation was adopted did not impose a criminal penalty for violation of the regulation, but provided for its enforcement by a civil action.

---

106 Prosser § 35, at 202-03.
107 Prosser § 21, at 203-04.
108 Cases cited note 103 supra.
109 Id.


Procedural Effect

Courts have adopted at least three different views of the procedural effect of the violation of a safety statute. The majority holds that the violation constitutes negligence per se. The minority position is that it is only evidence of negligence, and a few courts have held that it creates a presumption of negligence. The operation of the presumption of negligence and of the negligence-per-se rule is similar since under either concept, the statutory violation, unless excused or justified, establishes negligence. If the violation is held to be evidence of negligence only, the jury determines the issue of negligence as it does in any other case, and the statutory violation is merely one fact for it to consider.

Whether the difference in the procedural effect of the negligence-per-se and evidence-of-negligence rules has any practical effect upon the outcome of a case in the hands of the jury may be debated. That the courts attach meaning to this difference cannot be doubted since submission of a case to the jury under the wrong rule is held to be reversible error. Further, a jurisdiction that adopts the negligence-per-se rule seldom adheres to it uniformly, and in some cases applies the evidence-of-negligence rule for the apparent purpose of giving the jury greater freedom in considering the case.

While the general rule in North Carolina is that the violation of a safety statute constitutes negligence per se, at one time the North Carolina court vacillated between the negligence-per-se and the evidence-of-negligence rules. The court apparently adopted the latter rule in some cases under the erroneous assumption that it established defendant's liability and thereby foreclosed any inquiry into causal questions. In Ledbetter v. English the court reviewed these earlier cases, recognized

---

111 E.g., Gill v. Whiteside-Hemby Drug Co., 197 Ark. 425, 122 S.W.2d 597 (1938).
113 Cases cited in notes 128 & 129 infra.
114 See discussion in following paragraphs and discussion of effect of violation of municipal ordinances and administrative regulations at p. 748 supra.
116 The cases are collected and discussed in Ledbetter v. English, 166 N.C. 125, 81 S.E. 1066 (1914).
the conflict, identified the mistake that had led to use of the evidence-of-negligence rule in some cases, and adopted the negligence-per-se rule. Since Ledbetter, the court has followed the negligence-per-se rule, but exceptions to it have been made.

The application of the general rule to statutes regulating the conduct of pedestrians has been rejected, and a violation of them has been held to be evidence of negligence only. Thus, when a pedestrian, contrary to the provisions of a statute, fails to obey traffic signals,\\footnote{\textnormal{Templeton v. Kelly, 215 N.C. 577, 2 S.E.2d 696 (1939).}} crosses a street or highway at a place other than an intersection or crosswalk when either is available,\\footnote{\textnormal{Bass v. Roberson, 261 N.C. 125, 134 S.E.2d 157 (1964).}} walks on the wrong side of the road,\\footnote{\textnormal{Simpson v. Wood, 260 N.C. 157, 132 S.E.2d 369 (1963); Simpson v. Curry, 237 N.C. 260, 74 S.E.2d 649 (1953).}} or fails to yield the right of way to oncoming cars,\\footnote{\textnormal{Price v. Miller, 271 N.C. 690, 157 S.E.2d 347 (1967); Wanner v. Alsup, 265 N.C. 308, 144 S.E.2d 18 (1965).}} such conduct in itself is not negligence. His violation of the statute is evidence of negligence that may be considered by the jury with other facts, and under all the facts the jury is to decide whether he has been negligent. Of course, this view does not preclude a finding of negligence as a matter of law when the only inference to be drawn from all the facts is that the pedestrian was negligent.\\footnote{\textnormal{Price v. Miller, 271 N.C. 690, 157 S.E.2d 347 (1967); Wanner v. Alsup, 265 N.C. 308, 144 S.E.2d 18 (1965).}} The court in limiting the probative force of proof of the violation of these statutes has relied upon section 20-174(e) of the North Carolina General Statutes. This section provides that, notwithstanding duties imposed upon pedestrians by statutes, “every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway. . . .” From this provision the court has concluded that “the reciprocal or correlative duties” imposed upon the driver and the pedestrian preclude a holding that the pedestrian’s conduct was negligence per se.\\footnote{\textnormal{Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968); Blake v. Mallard, 262 N.C. 62, 136 S.E.2d 214 (1964); Garmon v. Thomas, 241 N.C. 412, 85 S.E.2d 589 (1955).}}

Other exceptions to the negligence-per-se rule have been created by the legislature. From time to time the legislature has provided in a traffic law that its violation “shall not be considered negligence per se or contributory negligence per se . . . but the facts relating thereto may be considered with other facts . . . in determining . . . negligence or contributory negligence. . . .”\\footnote{\textnormal{\textit{E.g.}, Simpson v. Curry, 237 N.C. 260, 74 S.E.2d 649 (1953).}} These statutes are relatively few in
number and clearly do not represent any systematic attempt by the legislature to overturn the negligence-per-se rule that is generally applied by the court. Occasionally, as when the speed of a car has prevented the driver from stopping within the distance to which his headlights permitted him to see, a confused and inconsistent judicial interpretation of the effect of a statutory violation may have been the reason for the intervention of the legislature.²¹⁵ Beyond this possibility, however, nothing appears except a few isolated instances in which the legislature has modified the judicial rule. The statutes are not connected by the subject matter with which they deal and cannot all be classified as minor or insignificant. One might hazard the guess that these changes reflect more the disgruntlement of an attorney-legislator whose client’s negligence was established by proof of the violation of a statute than any genuine legislative policy. If they do represent an attempt to effectuate a particular legislative policy, the effort has been a haphazard one that, as will be seen, has created a ripe source for instructional errors in negligence cases. The legislature should either deal with the problem in a comprehensive way or leave the judicial rule intact.

The existence of two rules for determining the probative value of evidence of the violation of a safety statute has been a source of confusion and legal error. Statutes that call for the application of both rules have been involved in a single case.²¹⁶ It is largely a matter of speculation whether the jury’s decision is affected when the case is submitted to it under instructions that the defendant’s violation of a statute is negligence in itself while the plaintiff’s failure to comply with another statute is only evidence of negligence. Yet, the possibility that the jury may be influenced by the apparently greater significance given to one of the statutes by the court does not seem entirely remote. In the absence of any offsetting benefit, avoidance of such situations seems desirable.

Whatever the jury’s ability to apply the two rules may be, trial judges

²¹⁵ The cases are collected and discussed in Notes, 30 N.C.L. Rev. 62 (1951) and 27 N.C.L. Rev. 153 (1948).
²¹⁶ The cases are collected and discussed in Notes, 30 N.C.L. Rev. 62 (1951) and 27 N.C.L. Rev. 153 (1948).

view mirror); id. § 20-140.2(b) (Supp. 1969) (safety helmets for motorcyclists); id. § 20-141(b1) (minimum speed limits); id. § 20-143 (vehicles to stop at railroad crossings); id. § 20-149(b) (audible signal of intent to pass); id. § 20-154 (starting, stopping, and turning signals); id. § 20-158 (stop sign); id. 20-158.1 (yield-right-of-way sign); id. § 20-175.3 (cane or seeing-eye dog for blind).
have experienced substantial difficulty with them. For example, in *Pickard v. Burlington Belt Corp.* error was found because the trial court gave an extensive instruction that attempted to distinguish between evidence of negligence and negligence per se. The North Carolina Court of Appeals held that the distinction was inapplicable to the facts of the case and that the trial court should simply have instructed that a violation of the particular statute constituted negligence per se. In a number of cases the trial court has overlooked a statutory change and has erroneously instructed that a violation of the amended statute was negligence per se; less frequently a charge that the statutory violation was evidence of negligence has been given when the negligence-per-se rule should have been applied.

Under the negligence-per-se rule, proof of violation of a statute establishes defendant's negligence. On the issue of negligence, this proof not only makes out a case for the jury, but also limits its function to determining whether the evidence shows a violation of the statute. When the versions of the facts given by plaintiff and defendant are in conflict, the decision of which version is to be accepted is for the jury. However, if plaintiff's evidence fails to establish facts that show a violation of a statute, an instruction that submits the statute to the jury as a basis for finding defendant's negligence is erroneous. Direct evidence of the violation is not required, and circumstantial evidence, such as the physical facts at the scene of an automobile accident, may be sufficient to establish the violation.

If plaintiff's evidence permits a finding that a statute has been violated, the trial judge must do more than read the statute to the jury. He

---

must explain and apply the statute to the evidence by indicating what facts, if found by the jury, will constitute a violation.\textsuperscript{186} He must instruct the jury that a violation, if established, constitutes negligence per se, and failure to give this instruction is prejudicial error that is not cured by an instruction applying the reasonably-prudent-man standard.\textsuperscript{188}

"The distinction, between a violation of a statute or ordinance which is negligence \textit{per se} and a violation which is not, is one of duty. In the former the duty is to obey the statute, in the latter the duty is due care under the circumstances."\textsuperscript{127} When the statutory violation is held to be only evidence of negligence, the determination whether negligence has been established is for the jury, and the violation is to be considered with other facts in making that determination.\textsuperscript{128} Evidence that permits a finding of the violation of a statute seems to be sufficient to require submission of the case to the jury and to support a verdict by the jury that there was negligence.\textsuperscript{129} Although the standard of reasonable care is applicable, the jury must be instructed that a violation of the statute is evidence of negligence, and the failure to so instruct is error.\textsuperscript{140}

Proof of violation of a statute, unlike some other special modes of proof, does not necessarily establish a prima facie case. The significance of such proof is limited to the issue of negligence and leaves open the question of the causal relationship between the statutory violation and plaintiff's harm.\textsuperscript{141} Proof of the violation of a statute neither entitles plaintiff

\begin{footnotesize}
\textsuperscript{185} Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 156 S.E.2d 265 (1967); Brown v. Boren Clay Prod. Co., 5 N.C. App. 418, 168 S.E.2d 462 (1969). The statute concerning reckless driving (N.C. Gen. Stat. § 20-140 (1965)) has been a fruitful source of instructional error, and attorneys may do well to heed the caution of Justice Sharp in Ingle: Usually, [in pleading reckless driving] he will merely repeat previous or subsequent allegations with reference to negligence or contributory negligence, and nothing but excess verbiage has been added to the case. . . . Similarly, when the judge has correctly instructed the jury upon the law applicable to the various acts of negligence . . . , there is no need to reassemble the parts and present them to the jury in a packaged proposition labeled reckless driving, for the whole is equal to the sum of its parts.

271 N.C. at 284, 156 S.E.2d at 271.

\textsuperscript{186} Cassetta v. Compton, 256 N.C. 71, 123 S.E.2d 222 (1961).


\textsuperscript{190} Barnes v. Teer, 219 N.C. 823, 15 S.E.2d 379 (1941).

\textsuperscript{191} Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954); Woods v. Freeman, 213 N.C. 314, 195 S.E. 812 (1938).
\end{footnotesize}
to recover nor justifies submission of the case to the jury unless the evidence also permits a finding that the conduct in violation of the statute was the actual\footnote{Clarke v. Holman, 274 N.C. 425, 163 S.E.2d 783 (1968) (failure to give turn signal; could not have been seen if given); Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963) (failure to have head lamp on bicycle; could not have been seen by following motorist if lighted).} and legal\footnote{Rowe v. Murphy, 250 N.C. 627, 109 S.E.2d 474 (1959) (insulating negligence found); Wood v. Carolina Tel. & Tel. Co., 228 N.C. 605, 46 S.E.2d 717 (1948) (type of injury unforeseeable).} cause of plaintiff's injury. While often the same facts that show a statutory violation may be sufficient to permit the jury to find the requisite causal relationship, in some cases they do not. In these instances, unless additional evidence is presented, plaintiff has not made out a case for the jury.

Protective Purpose of Statute

The relationship between defendant's violation of a statute and plaintiff's injuries may be obvious, or it may be so remote that little, if any, connection between them can be found. Any suggestion that defendant should be liable, no matter how tenuous this relationship may be, is clearly unacceptable. The determination of when liability attaches, once defendant's fault has been shown, is traditionally dealt with in the framework of proximate cause. This traditional approach is applicable when the violation of a statute is relied upon to establish a defendant's negligence.\footnote{Proximate cause in relation to violation of statutes is discussed pp. 761-62 infra.} However, since violation of a statute as a mode of proof derives its special probative force from the court's finding in the statute a legislative standard for tort liability, the purpose of the legislature in enacting the statute becomes highly relevant to the determination of when liability will be imposed. Thus, if a statute that limits the number of consecutive working hours for employees is intended to prevent injuries arising out of fatigue, its violation may be of no importance in determining an employer's liability for injuries to employees from other causes.\footnote{Williamson v. Old Dominion Box Co., 205 N.C. 350, 171 S.E. 335 (1933); Austin v. Southern Ry., 197 N.C. 319, 148 S.E. 446 (1929).}

The inquiry into legislative purpose in determining the extent of liability for violation of a statute has developed a substantial body of law.\footnote{PROSSER § 35, at 193-98.} The refinement of this development is reflected in the Restatement of Torts, in which the following elements are identified as crucial to determination of legislative intent: (1) the class of persons protected by...
the statute, (2) the particular interest safeguarded, (3) the kind of harm to which protection extends, and (4) the particular hazard against which protection is sought.\footnote{Restatement (Second) of Torts § 286 (1965).} Although the legislative-purpose analysis has been used by the North Carolina court to explore questions of the extent of liability for a statutory violation, the court has also dealt with many of them under a proximate-cause analysis. The substantial difficulties that arise from the proximate-cause approach are discussed later in this article.\footnote{See discussion pp. 761-62 infra.}

The terms\footnote{Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968) (supervision of apprentice in cosmetology); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968). (seat belts).} or history\footnote{Porter v. Yoder & Gordon Co., 246 N.C. 398, 98 S.E.2d 497 (1957) (labeling of poisons).} of a statute may negate any legislative intention, expressed or implied, to establish a standard of tort liability or may show that the statute was intended to regulate the conduct of a limited class to which defendant does not belong.\footnote{Swaney v. Peden Steel Co., 259 N.C. 531, 131 S.E.2d 601 (1963); Porter v. Yoder & Gordon Co., 246 N.C. 398, 98 S.E.2d 497 (1957).} In these instances, the legislative intent controls, and the violation of the statute may become irrelevant to the determination of civil liability. For example, a statute requiring cars to be equipped with seat belts and anchorage units may be found to impose no duty to use such belts and, when so interpreted, to have little bearing on the question whether a failure to use them constitutes negligence.\footnote{Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968).} For the same reason, if defendant's conduct falls within an exception created by a statute, the enactment, no matter how clearly defined its protective purpose may be, cannot be relied upon to establish negligence.\footnote{Rowe v. Murphy, 250 N.C. 627, 109 S.E.2d 474 (1959); Hammett v. Miller, 227 N.C. 10, 40 S.E.2d 480 (1946); Ledbetter v. English, 166 N.C. 125, 81 S.E. 1066 (1914).}

One of the more important problems that arise in determining the effect of a statute upon tort liability concerns the types of risk against which the statute was intended to protect. Except in those cases in which the court has entangled the issue in a proximate-cause analysis, its decisions in this area have been realistic. In *Starnes v. Albion Manufacturing Co.*,\footnote{147 N.C. 556, 61 S.E. 525 (1908).} in ruling upon the effect of a violation of a statute prohibiting the employment of young children in factories, the court said:

\[\text{\footnotemark[147] Restatement (Second) of Torts § 286 (1965).} \]
The act was designed not only to protect the health, but the safety of children of tender age from the indiscretion and carelessness characteristic of immature years. . . .

We think that the breach of the statute constitutes actionable negligence wherever it is shown that the injuries were sustained as a consequence of the wrongful employment.

. . . In this case we think there is a direct causal connection between the unlawful employment . . . and the injuries sustained.

. . . While in its employment and on its premises, in tampering, through childish carelessness incident to his years, with dangerous machinery, he was injured. Had he not been employed he would . . . not have been . . . exposed to the temptation to meddle with dangerous instruments.165

The court has given a similarly broad interpretation to the traffic laws by holding that they were intended to protect not only persons using the highways, but also persons and property off the highway that were likely to be harmed by violation of such enactments.166 In this same pattern is a decision in which the court refused to find that a statute regulating the size and weight of vehicles was intended only for the protection of highways and bridges, and held that its protection extended also to persons using the highways.167

Most courts agree that various licensing statutes, such as those that require a license for the practice of medicine or the operation of a car, do not impose an absolute standard under which persons engaging in such activities without a license are liable for all harm that they may cause. The person injured by activity of an unlicensed defendant may recover only upon proof that the defendant has failed to use the care required of those who are licensed.168 Thus, one who without a license holds himself out to practice medicine will be subject to the same standard of care as licensed doctors in the particular field of practice, but if there is no evidence to show that he has fallen below that standard, he cannot be held liable. Although the North Carolina court has consistently held that the violation of a licensing statute constitutes negligence per se, in most of the cases it has reached the result followed by a majority of jurisdictions

\[\text{\textsuperscript{165} Id. at 562-63, 61 S.E. at 527-28. For a similar interpretation, see McGowan v. Iyanhoe Mfg. Co., 167 N.C. 192, 82 S.E. 1028 (1914).} \]
\[\text{\textsuperscript{166} Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954).} \]
\[\text{\textsuperscript{168} PROSSER § 35, at 197-98.} \]
by holding as a matter of law that no causal connection existed between
the statutory violation and plaintiff’s injury.\footnote{109}

In one case,\footnote{109} which perhaps can be justified on other grounds, the
court has developed a restrictive view of the protective purpose of a
statute. This decision holds that the passenger in a car that crosses the
center line and runs off the left side of the road cannot, in proving the
driver’s negligence, rely on the statute requiring cars to be driven on
the right side of the road. The court, interpreting the statute, said: “Its
purpose is the protection of occupants of other vehicles then using the
public highway and pedestrians and property thereon. Here there is no
evidence that any other vehicle or person or property upon the public
highway was in any way involved.”\footnote{161} The court was obviously troubled
by the fact that the evidence showed that the driver had lost control of
the car before it crossed into the left lane. However, it did not decide
that the absence of any intent to steer the car to the left precluded a
finding that the statute had been violated, but concluded that “the fact
that the car went off the left rather than the right side of the road was
not a proximate cause of plaintiff’s injuries.”\footnote{162} It is difficult to perceive
why loss of control should be given significance when, as in this case, the
jury could find that it was due to the driver’s negligence. Apart from
this idea, however, the court’s narrow interpretation of the protective
purpose of the statute seems clearly wrong.

In determining a statute’s effect upon tort liability, the court considers
not only the type of risks that it covers, but also the class of persons
that the statute is intended to protect. If a statute is designed to promote
the safety of a particular class, its violation cannot be relied upon by
one who is not a member of that class.\footnote{108} In Belk v. Boyce,\footnote{104} for example,
the court held that the plaintiff, who had been struck by a bullet fired at

\footnotesize{\begin{itemize}
  \item Grier v. Phillips, 230 N.C. 672, 55 S.E.2d 485 (1949) (dentistry); Beaman
  v. Duncan, 228 N.C. 600, 46 S.E.2d 707 (1948) (automobile driver’s license);
  Smith v. Whitley, 223 N.C. 534, 27 S.E.2d 442 (1943) (pilot’s license); Hardy v.
  Dahl, 210 N.C. 530, 187 S.E. 788 (1936) (naturopathy); Ham v. Greensboro Ice
  & Fuel Co., 204 N.C. 614, 169 S.E. 180 (1933) (truck driver’s license). \textit{But see}
  p. 762 & cases cited note 190 \textit{infra.}
  \item \textit{Id.} at 710-11, 122 S.E.2d at 708.
  \item \textit{Id.} at 711, 122 S.E.2d at 708. For a similar case, in which Virginia law was
  applied, see Fasfour v. Fahad, 214 N.C. 281, 199 S.E. 521 (1938).
  \item Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964); Swaney v. Peden Steel
  Co., 259 N.C. 531, 131 S.E.2d 601 (1963); Powell v. Clark, 255 N.C. 707, 122
  S.E.2d 706 (1962).
  \item \textit{Id.} at 711, 122 S.E.2d at 708. For a similar case, in which Virginia law was
  applied, see Fasfour v. Fahad, 214 N.C. 281, 199 S.E. 521 (1938).
\end{itemize}
a dog by the defendant, could not rely, in order to show negligence, upon the defendant's violation of the cruelty-to-animals statute since it was designed to protect animals and not human beings.

The court, in ascertaining the class of persons protected, has generally interpreted statutes broadly. A law regulating speed was held to protect those off the highway as well as those using it, and a prohibition against passing other vehicles on a curve was held to be for the benefit of occupants of an overtaken, as well as an oncoming, car. The court has held that the violation of an administrative regulation by an employee for whose safety the regulation was adopted could not be used by a third person to establish the employee's contributory negligence. Of special interest are cases in which the court has found trespassers to come within the protection of statutes regulating the conduct of property owners. This interpretation has been applied to a statute requiring railroads to give warning of the approach of a train and, more recently, to a municipal ordinance requiring enclosure of commercial swimming pools.

Excusable Violations

All courts recognize that it is undesirable to adhere so strictly to the legislative standard embodied in a safety statute that every violation of its terms, no matter what the surrounding circumstances, is held to be negligence. When necessary to avoid an arbitrary application of the legislative standard, they have held that defendant's conduct was not a violation of the statute or, if a violation, was excused. Whether the legislative standard will be avoided on these grounds depends upon the type of statute involved, the purposes intended to be accomplished by the statute, and the facts of a particular case.

---

Although the statute [prohibiting passing on a curve] is designed primarily to prevent collision between an overtaking automobile and a vehicle coming from the opposite direction, its provisions are germane to litigation between an overtaking motorist and the driver of the overtaken vehicle if there is evidence to the effect that the underlying accident was occasioned by an unsuccessful effort on the part of the former to pass the latter upon a marked curve.
168 Griffin v. Atlantic Coast Line R.R., 166 N.C. 624, 82 S.E. 973 (1914).
170 Prosser § 35, at 199-200.
The legislature may provide for unusual circumstances by exempting certain situations from the coverage of the statute. Thus section 20-161 of the North Carolina General Statutes, which prohibits parking or stopping a vehicle on the highway, is expressly made inapplicable to disabled vehicles. Sometimes the statute itself requires only due diligence in the performance of the acts specified by it so that the question involved in determining whether it has been violated is that of reasonable care. Further, many statutes are construed not to impose an absolute duty of compliance but only to require reasonable care to comply, and, when reasonable care is shown, no violation of the statute exists. Stephens v. Southern Oil Co. effectively illustrates this type of statutory construction:

Notwithstanding this mandatory language [requiring adequate brakes in good working order], the statute must be given a reasonable interpretation. . . . The Legislature did not intend to make operators of motor vehicles insurers of the adequacy of their brakes. The operator must act with care and diligence to see that his brakes meet the standard prescribed by statute; but if because of some latent defect, unknown to the operator and not reasonably discoverable upon proper inspection, he is not able to control the movement of his car, he is not negligent . . . .

Such an interpretation, of course, does not substitute defendant's judgment or the standard of the reasonably prudent man for that fixed by the legislature, but relates only to the effort that must be made to comply with the legislative standard. However, the courts in a few jurisdictions have held that the violation of a statute, even though no emergency exists, will be excused when compliance with it would have involved greater danger. This question has not been decided in

---

172 E.g., N.C. Gen. Stat. § 20-152(a) (1965): "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway."
173 E.g., Smith v. Nunn, 257 N.C. 108, 125 S.E.2d 351 (1962) (driver entering highway from private road to yield right of way); Petree v. Johnson, 2 N.C. App. 336, 163 S.E.2d 87 (1968) (driver turning from direct line to see that turn can be made safely).
175 Id. at 459, 131 S.E.2d at 41-42. Accord, Stone v. Mitchell, 5 N.C. App. 373, 168 S.E.2d 668 (1969).
176 Cameron v. Stewart, 153 Me. 47, 134 A.2d 474 (1957) (walking on street outside paved portion because sidewalks covered with snow); Tedla v. Ellman, 280 N.Y. 124, 19 N.E.2d 987 (1939) (walking on right side of road to avoid heavy
North Carolina, but the court has held that disobedience of traffic laws when necessary to avoid a collision is excused.\textsuperscript{177}

A failure to comply with a statute in an emergency that arises without defendant's fault is not negligence. Thus a motorist may drive his car to the left side of the road\textsuperscript{178} or attempt to pass another vehicle on the right\textsuperscript{179} without being held negligent when such action is necessary to avoid an impending collision. However, to hold, as the North Carolina court has held,\textsuperscript{180} that a motorist's failure to give a signal of his intention to stop is excused because "[i]t had been raining and the windows of his car were up" may give too great an elasticity to the rule.

The violation of an ordinance that requires a motorist to stop before proceeding through an intersection is not negligence per se if the violator has no knowledge of the requirement and if the stop sign that gives notice of it is missing.\textsuperscript{181} Although the unwitting failure to comply with the ordinance is excused, the motorist is still held to the standard of reasonable care.\textsuperscript{182} Defendant's lack of knowledge in this kind of situation should be distinguished from his general ignorance of the law. Presumably, for example, if a motorist had no knowledge of the distance to which his headlights must give vision, his ignorance of the statutory requirement would not excuse his failure to comply.

Not every extenuating circumstance will excuse defendant's non-compliance with a safety statute. Defendant cannot excuse his violation by showing that his conduct was consistent with an established custom.\textsuperscript{183} That defendant's employer furnished a truck without adequate clearance lights does not justify defendant's driving it in that condition.\textsuperscript{184} Nor can a driver who backs his car without taking adequate precautions excuse his disregard of the statute by merely showing that the car ahead had begun to back towards him.\textsuperscript{185}

\begin{footnotes}

\item[177] Cases cited notes 178 & 179 infra.
\item[178] Cooke v. Jerome, 172 N.C. 626, 90 S.E. 767 (1916).
\item[181] Cases cited note 181 supra.
\item[182] Stultz v. Thomas, 182 N.C. 470, 109 S.E. 361 (1921).
\end{footnotes}
Proximate Cause

The full range of problems that courts have labeled "proximate cause" may arise when defendant's negligence is based upon the violation of a statute, and this mode of proof does not change the way in which these problems are handled. Although a few decisions eliminated foreseeability as a limitation upon defendant's liability when his negligence was based upon the violation of a statute, the court in later cases rejected this view and held that the doctrine of foreseeability is equally applicable whether defendant's negligence is shown by violation of statute or by other modes of proof. The court has frequently stated that proximate cause is normally an issue for the jury to decide and has applied this view in cases involving statutory violations.

Some problems that more appropriately come within the sphere of legislative purpose have been dealt with by the North Carolina court under the doctrine of proximate cause. To consider these problems as questions of proximate cause at best clouds the inquiry to be made and at worst identifies them in terms of an issue that is usually left for the jury to decide. The interpretation of a statute, including the determination of legislative purpose, is a legal question for the court. When it is phrased in terms of proximate cause, the danger exists that the question of legislative purpose will be submitted to the jury. This result in fact has occurred, and the jury has been asked to decide whether injuries, received by the plaintiff when he ran his car into a stationary train that had blocked a crossing for longer than ten minutes in violation of a municipal ordinance, were proximately caused by the defendant's violation of the ordinance. If, as seems likely, the purpose of the ordinance was to prevent delay in travel over the crossing, submission of the case to the jury was clearly wrong.

Another difficulty encountered under the proximate-cause approach to legislative purpose is illustrated by cases in which an unlicensed driver is

---

186 Cases cited note 85 supra.
187 Cases cited notes 86 & 87 supra.
involved in an automobile collision. In these cases the court not only has required an instruction that permitted a verdict for the plaintiff only if the automobile was operated imprudently at the time of the collision, but also has required an instruction that violation of the licensing statute was negligence per se. A correct verdict may come out of all of this confusion, but it must leave the jury somewhat perplexed. Fortunately, more frequent occurrence of these situations has been avoided by the court's willingness to find the absence of proximate cause as a matter of law.

Contributory Negligence

Although the legislative standard imposed by a safety statute may control the determination of defendant's negligence, it usually does not relieve plaintiff from the duty to use care for his own safety. The defense of contributory negligence is available to one who has violated a statute, and when plaintiff's own negligence combines with defendant's to cause the injury, plaintiff cannot recover. Occasionally included in the purpose of a statute, however, is an intent to protect persons from their own insufficiencies, and in such cases their contributory negligence will not operate to bar recovery. In North Carolina, a child labor statute has been so interpreted and in other jurisdictions this construction has been given to other statutes intended for the protection of children and to legislation to promote the safety of employees.

Plaintiff's negligence, as well as defendant's, may be shown by proof of the violation of a safety statute. In considering the effect of a violation, the court has made no distinction between negligence and contributory negligence; the principles already discussed are applicable when

---

101 See cases cited in notes 189 & 190 supra.
102 King v. Pope, 202 N.C. 554, 163 S.E. 447 (1932); Griffin v. Atlantic Coast Line R.R., 166 N.C. 624, 82 S.E. 973 (1914).
105 E.g., Tamiami Gun Shop v. Klein, 116 So.2d 421 (Fla. 1959) (sale of firearm to minor).
plaintiff has failed to comply with a statute. For example, when the class of persons protected by the statute is limited, a violation of the statute by a person for whose protection it was intended does not constitute contributory negligence. Such a statute is designed neither to fix a standard of liability for persons within the protected class nor to benefit others who are outside of it. The so-called "outlaw" theory under which a person who has violated a positive requirement of the law is denied any standing to recover was alluded to in a few older cases, but, beyond these few instances, has not received recognition from the court.

The effect of a child's violation of a statute is a difficult problem that, although not restricted to the issue of contributory negligence, most frequently arises in this context. The question presented is whether the statutory standard replaces the standard that normally applies to children and the presumptions of their incapacity. Since the negligence-per-se rule exists primarily by judicial choice rather than legislative mandate, the court is free to weigh the policies behind the two standards and to choose the one toward which the balance falls. Occasionally, the application of the legislative standard to children is rejected on this forthright basis, but more often the decision to reject it is rationalized on the ground that the legislature did not intend for it to apply to children. Under either view the statute likely will be found to reflect what is reasonably to be expected of adults and therefore to impose a standard that may exceed the limited capacity of children. Since neither the legislature's adoption of the statute nor the court's recognition of it in negligence cases represents an effort to modify the traditional concept of fault, no reason exists to impose a higher standard on children simply

---

197 Lloyd v. North Carolina R.R., 151 N.C. 536, 66 S.E. 604 (1909); Drum v. Miller, 135 N.C. 204, 47 S.E. 421 (1904). In Groome v. Davis, 215 N.C. 510, 2 S.E.2d 771 (1939), the court held that one who was negligent could not assume that others would obey the law. This case was overruled in Cox v. Hennis Freight Lines, Inc., 236 N.C. 72, 72 S.E.2d 25 (1952).
198 Santor v. Balnis, 151 Conn. 434, 199 A.2d 2 (1964); Rudes v. Gottschalk, 159 Tex. 552, 324 S.W.2d 201 (1959).

The per se negligence instruction is predicated on the theory that the Legislature has adopted a statutory standard of conduct that no reasonable man would violate, and that all reasonable adults would or should know such standard. But this concept does not apply to children. It is absurd to presume that a child of seven, as a matter of law, knows all of the standards of conduct set forth in the Vehicle Code.
because a statute is involved. A few jurisdictions, however, apply the statutory standard to children.\textsuperscript{293}

Although a recent North Carolina decision, \textit{Watson v. Stallings},\textsuperscript{204} apparently holds that the legislative standard applies to children as well as to adults, only one case, decided more than a half-century ago, was found in which the plaintiff was completely deprived of the benefit of the standard for children.\textsuperscript{205} No case was found in which the North Carolina court did not apply the conclusive presumption that a child under seven years of age is incapable of contributory negligence.\textsuperscript{200} Except for the case noted above, none was found in which the court did not apply the rule that a child between the ages of seven and fourteen is rebuttably presumed incapable of contributory negligence.\textsuperscript{207} In its only discussion of the problem, the court in \textit{Watson} stated:

When a statute prescribes a standard, the standard so prescribed by the General Assembly is absolute. . . . Although the standard is constant, "the degree of care which a reasonably prudent man exercises, or should exercise, varies with the exigencies of the occasion." . . . Thus, the standard of care for the riders of a horse or pony entering upon a public highway from a private road is constant. In applying the standard to the facts of this case, [the boy's] age, experience, capacity and knowledge are "exigencies of the occasion" to be considered in determining whether he exercised the degree of care a reasonably prudent boy of his age, experience, capacity and knowledge should and would have exercised . . . .\textsuperscript{208}

What the court in \textit{Watson} seems to decide is that a child, as well as an adult, must comply with a duty imposed by statute—in this case the duty to yield the right of way to the oncoming car. However, if care is used to comply with the statute, no violation occurs. In determining whether a child between the ages of seven and fourteen has exercised the requisite care to comply, both the presumption of incapacity and the

\textsuperscript{203} E.g., Bixenman v. Hall, 231 N.E.2d 530 (App. Ct. of Ind. 1967).
\textsuperscript{204} 270 N.C. 187, 154 S.E.2d 308 (1967).
\textsuperscript{205} Taylor v. Stewart, 172 N.C. 203, 90 S.E. 134 (1916).
\textsuperscript{206} For example, cases holding that a child under seven is incapable of contributory negligence as a matter of law are Ammons v. Britt, 256 N.C. 248, 123 S.E.2d 579 (1962); Walston v. Greene, 247 N.C. 693, 102 S.E.2d 124 (1958).
\textsuperscript{207} For example, cases holding that a child between seven and fourteen cannot be held contributorily negligent as a matter of law are: Wooten v. Cagle, 268 N.C. 366, 150 S.E.2d 738 (1966); Ennis v. Dupree, 258 N.C. 141, 128 S.E.2d 231 (1962).
\textsuperscript{208} 270 N.C. at 193, 154 S.E.2d at 312.
standard of care applicable to children must be used. Assuming that this interpretation of the case is correct, several questions arise. Does the rule that a child under seven years of age is incapable of contributory negligence prevail over the statutory standard? Is a child between seven and fourteen presumed to know of the statutory requirement (as would likely be the case for an adult) and, if not, may the jury, if it finds that he neither knew nor should have known of it, disregard the statute completely? Is such a child presumed to be incapable of complying with the statute, and, if so, must a defendant come forward with affirmative evidence of the child's knowledge of the statute, either actual or constructive, before the statute can be submitted to the jury at all? Is the trial judge required to instruct on this aspect of the case? Is he required to instruct that a violation of the statute is negligence per se or evidence of negligence, whichever is appropriate for a particular statute? A better approach to this problem would be neither to enforce the statutory standard nor to give special probative force to its violation, but simply to submit the statute to the jury as another factor for it to consider in applying the standard of care applicable to children.

When No Violation of Statute Exists

The standard imposed by a safety statute does not relieve the defendant from taking precautions other than those set out in the statute when the circumstances that confront him require such care. Even though he has complied with the statute, he may be liable for common law negligence. When a driver proceeds through an intersection on a green light, he must nevertheless keep a lookout for others in the intersection and take steps to avoid injury to them; if he fails to do so, he may be liable. Although the operator drives a car within the maximum speed limit imposed by statute, he must still take account of special hazards, such as the presence of young children, and reduce his speed to the extent required by the duty of reasonable care.

When for some reason defendant's conduct, although of the kind proscribed by a statute, does not constitute a violation of it, the question arises whether the statute may still be relevant to the determination of negligence. Some courts have held under these circumstances that the statute is some evidence of what a reasonable man would do and may

---

be admitted on this basis.\textsuperscript{211} The North Carolina court, in concluding that the evidence was sufficient to support a finding of negligence, has frequently referred to a statute regulating conduct similar to that involved in the case but not having been violated by defendant.\textsuperscript{212} For example, in \textit{Reeves v. Campbell},\textsuperscript{213} the defendant knowingly drove his car past a stopped school bus carrying a load of students under circumstances in which the statute requiring vehicles to stop for school buses was inapplicable. The court said: "The evidence . . . does not establish a violation of G.S. 20-217 but, . . . the spirit and purpose of the statute was violated."\textsuperscript{214} However, the court in these cases has not considered whether the statute is admissible in evidence so that the jury can use it in considering what a reasonably prudent man would have done in circumstances similar to those involved in the case.

\textsuperscript{211} \textit{Prosser} \textit{§} 35, at 203.

\textsuperscript{212} E.g., \textit{McCall v. Dixie Cartage \\& Warehousing, Inc.}, 272 N.C. 190, 158 S.E.2d 72 (1967) (failure to set hand brakes and check wheels of truck on private property); \textit{Chandler v. Forsyth Royal Crown Bottling Co.}, 257 N.C. 245, 125 S.E.2d 584 (1962) (although statute was not violated, it is "express recognition of the danger to motorists of the presence of [glass and debris] on the public highways").

\textsuperscript{213} \textit{264 N.C. 224}, 141 S.E.2d 296 (1965).

\textsuperscript{214} \textit{Id.} at 227, 141 S.E.2d at 298.