



2-1-1949

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Recommended Citation

Max O. Cogburn, *Negligence -- Per Se or Evidence of -- Violation of Statute as*, 27 N.C. L. REV. 274 (1949).

Available at: <http://scholarship.law.unc.edu/nclr/vol27/iss2/18>

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the modern rule is that under it a venomous publisher "could with immunity print a large number of extra copies of an issue containing libelous matter, retain them on hand and from time to time through the years mail them to members of the general public."¹⁸ This, it is urged, would be a part of the original publication and, as such, would not amount to another tort.

This argument, though weighty, would seem to be more concerned with the applicability than the validity of the single publication doctrine. It is to be remembered that this new theory of liability finds its basic justification in the fact that it protects the publisher or distributor of integrity from the legal hazards arising out of mass distribution of his printed matter.¹⁹ This justification is lost in the case of a malicious defendant who persists in circulating the libelous matter for the sake of the libel itself and not as a usual business practice,²⁰ and the beneficial single tort rule would appear inapplicable. In such a case, the single publication court could hold with consistence that the further malicious act of distribution, not occurring in the ordinary course of business, amounts to a new publication and a new tort.

ROBERT PERRY, JR.

Negligence—Per Se or Evidence of—Violation of Statute as

In a recent case¹ plaintiff's decedent was killed by defendant's truck. In an action brought to recover for the death, defendant claimed that plaintiff's decedent was contributorily negligent in that at the time of his death he was violating a statute requiring pedestrians to walk on the left-hand side of any highway.² *Held*: Plaintiff's decedent's violation of the statute did not make him contributorily negligent *per se* and the question of his contributory negligence was for the jury.

Negligence is the failure to comply with the legal standard of care³

¹⁸ *Winrod v. MacFadden Publications, Inc.*, 62 F. Supp. 249, 251 (N. D. Ill. 1945).

¹⁹ *Hartmann v. Time, Inc.*, 64 F. Supp. 671, 679 (E. D. Pa. 1946) ("There is discernible . . . a reluctance among the modern courts to apply that law (of multiple tort liability) when confronted with a controversy involving large distributions of printed matter such as are made by present day newspaper and magazine publishers."); *Winrod v. Time, Inc.*, 334 Ill. App. 59, 78 N. E. 2d 708 (1948).

²⁰ *See Winrod v. Time, Inc.*, 334 Ill. App. 59, 65, 78 N. E. 2d 708, 710 (1948) (" . . . no new cause of action will accrue if the subsequent distribution is reasonably connected, by trade practice relating to the type of printed matter involved, to the original distribution. . . .").

¹ *Lewis v. Watson*, 229 N. C. 20, 47 S. E. 2d 484 (1948).

² N. C. GEN. STAT. §20-174 (1943): "It shall be unlawful for pedestrians to walk along the traveled portion of any highway except on the extreme left-hand side thereof, and such pedestrians shall yield the right-of-way to approaching traffic."

³ RESTATEMENT, TORTS §284 (1934); HARPER ON TORTS §§68, 69 (1933); CLERK & LINDSELL ON TORTS §§12, 13 (7th ed., Wyatt-Paine, 1921); *Moore v. Chicago*

which standard may be either established by common law principles or by statute.⁴ Logically then, the violation of a statute designed to protect persons or property should constitute negligence without more. Many courts have so held⁵ and it has been the rule in North Carolina for some time that such is negligence *per se*.⁶ However, some decisions

Iron Works, 183 N. C. 438, 111 S. E. 776 (1922); Patton v. Atlantic C. L. R. R., 197 N. C. 17, 147 S. E. 698 (1929); Helms v. Citizens Light & Power Co., 192 N. C. 784, 136 S. E. 9 (1926); Saunders v. Southern Ry., 167 N. C. 375, 83 S. E. 573 (1914).

⁴ RESTATEMENT, TORTS §285, comments *b* and *c* (1934); CLARK, THE LAW OF TORTS §100 (1926); PROSSER, HANDBOOK OF THE LAW OF TORTS 264 (1941); see also, for a good statement, Osborne v. McMasters, 40 Minn. 103, 105, 41 N. W. 543 (1889). It is to be noted that, as used in this Note, *negligence* includes *contributory negligence* and *statute* includes *ordinance*.

⁵ Ward v. Cathey, 210 S. W. 289 (Tex. Civ. App. 1919) (ordinance forbidding autos to pass standing street-car); Opitz v. Schenck, 178 Cal. 636, 174 Pac. 40 (1918) (speed limit set by ordinance); Wright v. Salzberger & Son, 63 Cal. App. 450, 218 Pac. 785 (1923) (ordinance forbidding coasting); Riser v. Smith, 136 Minn. 417, 162 N. W. 520 (1917) (speeding ordinance); Amberg v. Kinley, 214 N. Y. 531, 108 N. E. 830 (1915) (statute requiring fire escape); Annis v. Britton, 232 Mich. 291, 205 N. W. 128 (1925) (housing statutes); Fox v. Bearekman, 178 Ind. 572, 99 N. E. 989 (1912) (speed statute).

⁶ Leathers v. Durham Tobacco Co., 144 N. C. 330, 57 S. E. 11 (1907) (statute prohibiting employment of children under 12 years of age in factories); Starnes v. Albion Mfg. Co., 147 N. C. 556, 61 S. E. 525 (1908) (statute forbidding employment of children under 12 years of age in factories); Rich v. Asheville Elec. Co., 152 N. C. 689, 68 S. E. 232 (1910) (statute requiring street passenger railway companies to use vestibule fronts on passenger cars); Paul v. Atlantic C. L. R. R., 170 N. C. 230, 87 S. E. 66 (1915) (ordinance forbidding blocking of street by railroads for more than five minutes); Zageir v. Southern Express Co., 171 N. C. 692, 89 S. E. 43 (1916) (ordinance requiring license for car); Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134 (1916) (statute prohibiting persons under 16 years of age from driving autos upon highway); Godfrey v. Queen City Coach Co., 201 N. C. 264, 159 S. E. 412 (1931) (speed statute); King v. Pope, 202 N. C. 554, 163 S. E. 447 (1932) (statutes prohibiting reckless driving, setting speed restrictions, requiring that driving be upon right-hand side of highway); Ham v. Greensboro Ice & Fuel Co., 204 N. C. 614, 169 S. E. 180 (1933) (ordinances requiring license to operate truck, parking parallel to curb and prohibiting backing in city street); Johnson v. Atlantic C. L. R. R., 205 N. C. 127, 170 S. E. 120 (1933) (ordinance regulating speed of trains in city limits); Sherwood v. Southeastern Express Co., 206 N. C. 243, 173 S. E. 605 (1934) (ordinance prohibiting backing of motor vehicle in street); Holland v. Strader, 216 N. C. 436, 5 S. E. 2d 311 (1939) (statute requiring person, before stopping motor vehicle on highway, to determine whether he can safely do so); Williams v. Woodward, 218 N. C. 305, 10 S. E. 2d 913 (1940) (statute providing that vehicles be operated on right-hand side of highway and that warning be given pedestrians); Miller v. Lewis & Holmes Motor Freight Corp., 218 N. C. 464, 11 S. E. 2d 300 (1940) (statute requiring that pedestrians walk on left-hand side of highway); Tarrant v. Pepsi Cola Bottling Co., 221 N. C. 390, 20 S. E. 2d 565 (1942) (statute prohibiting driving upon highway at greater speed than is reasonable or prudent). In Leathers v. Durham Tobacco Co., *supra*, the court quoted with approval the following from I THOMPSON ON NEGLIGENCE §10: "When the legislature [or city council], having in view the promotion of the safety of the public or of individual members of the public, commands or forbids the doing of a particular act, . . . a failure to do the act commanded, or doing the act prohibited is negligence as a mere matter of law, otherwise negligence *per se*; and this, irrespective of all questions of the exercise of prudence, diligence, care, or skill. So that if it is the proximate cause of hurt or damage to another, and if that other is without contributory fault, the case is decided in his favor. . . ." The court further quoted with approval from I STREET, FOUNDATIONS OF LEGAL LIABILITY §172 (1906): "The violation of an

have seemed to deviate from this position by saying that such violation is only evidence of negligence.⁷ For example, in *Henderson v. Durham Traction Co.*⁸ where violation of a statute requiring street railways to use fenders in front of their cars was held to be evidence of negligence, it was said: "*The element of proximate cause must be established and it will not necessarily be presumed from the fact that a statute or city ordinance has been violated. Negligence . . . can not result in a right of action unless it is the proximate cause of the injury complained of by the plaintiff.*"⁹ On the other hand, in *Ham v. Greensboro Ice and Fuel Co.*¹⁰ where the violation of a city ordinance requiring parking of trucks at the curb was held to be negligence *per se*, the court said: "All the decisions of this state since (1913) concur in the view that the violation of an ordinance or statute . . . is negligence *per se*. Notwithstanding, the same decisions do not permit *recovery* . . . unless there was a causal relation between the violation and the injury."¹¹

imposed statutory duty is a sort of negligence *per se* . . . and the sole question to be settled in cases of this kind is whether that delinquency can be considered a proximate cause of the damage of which complaint is made."

⁷ *Edwards v. Atlantic C. L. R. R.*, 129 N. C. 78, 39 S. E. 730 (1901) (ordinance regulating speed of trains within city); *Henderson v. Durham Traction Co.*, 132 N. C. 779, 44 S. E. 598 (1903) (statute requiring street passenger railway companies to have fenders on front of all cars run); *Duval v. East Carolina R. R.*, 134 N. C. 331, 46 S. E. 750 (1904) (contract by defendant with city to limit speed of its trains, which contract was similar to ordinance); *Templeton v. Kelley*, 215 N. C. 577, 2 S. E. 2d 696 (1939) (statute prohibiting pedestrians' crossing at other places than marked cross-walk between adjacent intersections which have traffic control signals in operation); *Gaskins v. Kelly*, 228 N. C. 697, 47 S. E. 2d 34 (1948) (statute requiring pedestrians to yield right-of-way to all vehicles when crossing road at point other than marked cross-walks or within unmarked cross-walks at intersections); *Ward v. Bowles*, 228 N. C. 273, 45 S. E. 2d 354 (1947) (statute prohibiting "cutting corners" when turning auto at intersection).

⁸ 132 N. C. 779, 44 S. E. 598 (1903).

⁹ *Id.* at 784 (italics supplied). To the same effect, *see Duval v. Atlantic C. L. R. R.*, 129 N. C. 78, 39 S. E. 730 (1901), where it was held that violation of a contract by the defendant which it had with the City of New Bern to limit the speed of its trains through the streets of said city was evidence of negligence, the court said: "It (*i.e.*, the contract) was similar to an ordinance, in purpose and legal effect at least, in civil actions. We do not feel compelled in this case to go to the extent of saying that the violation . . . gives rise to a cause of action; but we hold that, equally with the violation of an ordinance, it is evidence of negligence on the part of the defendant" (italics supplied).

¹⁰ 204 N. C. 614, 169 S. E. 180 (1933).

¹¹ *Id.* at 617 (italics supplied). *See also*, *Paul v. Atlantic C. L. R. R.*, 170 N. C. 230, 87 S. E. 66 (1915); *Rich v. Asheville Elec. Co.*, 152 N. C. 689, 68 S. E. 232 (1910); *Godfrey v. Queen City Coach Co.*, 201 N. C. 264, 159 S. E. 412 (1931); *Norfleet v. Hall*, 204 N. C. 573, 169 S. E. 143 (1933); *James v. Carolina Coach Co.*, 207 N. C. 742, 178 S. E. 607 (1935); *Leathers v. Durham Tobacco Co.*, 144 N. C. 330, 57 S. E. 11 (1907); *Starnes v. Albion Mfg. Co.*, 147 N. C. 556, 61 S. E. 525 (1908); *Zageir v. Southern Express Co.*, 171 N. C. 692, 89 S. E. 43 (1916); *King v. Pope*, 202 N. C. 554, 163 S. E. 447 (1932); *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134 (1916); *Johnson v. Atlantic C. L. R. R.*, 205 N. C. 127, 170 S. E. 120 (1933); *Sherwood v. Southeastern Express Co.*, 206 N. C. 243, 173 S. E. 605 (1934); *Holland v. Strader*, 216 N. C. 436, 5 S. E. 2d 311 (1939); *Williams v. Woodward*, 218 N. C. 305, 10 S. E. 2d 913 (1940); *Tarrant v. Pepsi Cola Bottling Co.*, 221 N. C. 390, 20 S. E. 2d 565 (1942).

An examination of the language of these two cases demonstrates that when the court says that violation of a statute is evidence of negligence, it is using a broader concept of negligence than when it says that such is negligence *per se*. In the former instance its concept includes both breach of a legal standard of care and the element of proximate cause. In the latter it contains only the breach of a legal standard of care. In the differing content of these concepts lies the explanation of the court's use of the different terminologies. If the court is thinking of the broader concept of negligence it will say that violation of a statute is evidence of negligence. Its reasoning in such a case is that since its concept of negligence includes proximate cause and since proximate cause is not attendant upon every breach of a statutory standard of care, an element of its concept of negligence may be missing. Therefore, the court does not feel free to summarily say that the whole concept is present and that the violation is negligence *per se*. However, if the court is thinking of the narrower concept of negligence it will say that the violation of a statute is negligence *per se* because the narrower concept includes only breach of a legal standard of care and the violation of a statute readily furnishes that element.

This difference in what the court *says* carries over into what it *does*. In all these cases¹² both breach of a statute and a proximately caused injury were prerequisites to recovery. However, the presence of these elements is ascertained differently depending upon whether the court says that violation of a statute is evidence of negligence or negligence *per se*. Since proximate cause includes questions of public policy, statutory interpretation, and actual causation,¹³ it is apparent that no part of the problem of proximate cause can properly be submitted to the jury except that of actual causation. Nevertheless, in the principal case¹⁴ the following issue was submitted to the jury—"Did the plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer?" This issue included questions of negligence and proximate cause mingled together and was approved on appeal. The submission of such double barreled issues allows matters to be determined by the jury which are properly for the court, such as whether the injured person was a member of the class of persons which the statute was designed to protect and whether the injury was one of the sort which the statute was designed to prevent.

It is suggested that this abdication by the court of its proper functions could be eliminated in this way: When the court is faced with violation of a statute designed to protect persons or property it should

¹² See notes 6 and 7 *supra*.

¹³ GREEN, RATIONALE OF PROXIMATE CAUSE (1927).

¹⁴ See note 1 *supra*.

say that the violator is negligent *per se*, for which holding it has ample precedent.¹⁵ The question then left to be answered would be whether the violation was the proximate cause of the injury. The court should, in answering this question, determine at the outset, by interpretation of the statute involved, whether the injured party belongs to the class of persons which the statute was designed to protect and whether the injury which has occurred is one of the sort which the statute was designed to prevent. If the court finds that the answer to either of these questions is in the negative, it should rule, as a matter of law, that the violation was not the proximate cause of the injury. If the court finds that the injured person is a member of the class of persons which the statute was designed to protect and that the injury which has occurred is of the sort which the statute was designed to prevent, there remain two questions; namely, whether the party violated the statute and whether the act of the party which violated the statute actually caused the injury of which complaint is made. If more than one inference can reasonably be drawn as to the answer to either of these two questions, it should be submitted to the jury for their finding as to which inference should be drawn.

MAX OLIVER COGBURN.

Taxation of Income—Dividends in Kind—Corporation's Liability

In a recent case¹ before the Circuit Court of Appeals for the Fifth Circuit, the taxpayer corporation held certain notes which had been charged off as wholly worthless and deducted as bad debts in previous income tax returns. In 1942, when it became apparent that some of the notes could be collected, the notes were declared as a dividend in kind and distributed to the stockholders. No value was placed on the notes by the corporation. The commissioner determined that the amount collected by the stockholders on the dividend notes was taxable as income to the corporation. The Tax Court reversed the commissioner, holding that a corporation does not realize income by its distribution of a dividend in kind.² The circuit court of appeals reversed the Tax Court. It held that the amount collected on the notes was income to the extent of the tax benefit received on account of the deductions previously allowed and was taxable to the corporation under the assignment of expectant income theory.

The taxpayer and the Tax Court relied on *General Utilities & Operating Co. v. Helvering*³ for the proposition that a corporation does

¹⁵ See note 6 *supra*.

¹ Commissioner v. First State Bank of Stratford, 168 F. 2d 1004 (C. C. A. 5th 1948).

² First State Bank of Stratford, 8 T. C. 831 (1947).

³ 296 U. S. 200 (1935).