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Negligence -- Railroads -- Custom as Evidence

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Another situation where the doctrine of "sudden appearance" is inapplicable is where the driver has been guilty of some negligent act which made it impossible to see the child or to avoid the accident after seeing the child.[12] So, where a child darts out from beside the road, and the driver is going at such an excessive rate of speed that he is unable to stop before striking the child, he cannot escape liability under this doctrine.[13]

Whether the driver saw, or could have seen, the child in time to avoid a collision, and whether, once seen, he exercised the care of a reasonable, prudent man to avoid a collision, is always a question of fact. But once it is established that the child was or should have been seen, the doctrine of "sudden appearance" becomes inapplicable, and the tendency of most courts is to hold the driver to an almost absolute liability.[14]

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Negligence—Railroads—Custom as Evidence

Defendant's train was blocking a city street for longer than five minutes, in violation of a municipal ordinance, when plaintiff attempted to climb between the cars in order to return to his place of employment. The train was suddenly moved without signal injuring plaintiff. The district court excluded evidence of a long standing custom for persons to climb between railroads cars which blocked the crossing, and dismissed on the ground that plaintiff was guilty of contributory negligence. In *Stratton v. Southern Ry.*,[1] the Court of Appeals for the Fourth Circuit

Thayer, 229 N. C. 773, 51 S. E. 2d 488 (1949); Price v. Burton, 155 Va. 229, 154 S. E. 499 (1930).

But see Brown v. Wade, 145 So. 790 (La. App. 1933), where the court stated that a driver could assume that a child would stay on an urban sidewalk, but could not so assume as to a child on a county road; Faatz v. Sullivan, 199 Iowa 875, 200 N. W. 321 (1924), where a boy was struck by defendant after he had passed pathway of car when he retraced his steps, the Supreme Court held the jury should have been told that driver of automobile had right to assume that the boy having reached a place of safety would either remain there or continue on his journey; Moeller v. Packard, 86 Cal. App. 459, 261 Pac. 135 (1927); Hutcheson v. Misenheimer, 169 Va. 511, 194 S. E. 665 (1938).

[12] Butler v. Allen, 233 N. C. 484, 64 S. E. 2d 561 (1951); Kelly v. Hunsucker, 211 N. C. 153, 189 S. E. 664 (1936); Goss v. Williams, 196 N. C. 213, 145 S. E. 169 (1928); Harper v. Crislip, 103 Va. 514, 138 S. E. 93 (1927).

[13] Butler v. Allen, 233 N. C. 484, 487, 64 S. E. 2d 561, 563 (1951), ". . . where one is driving an automobile at a speed in excess of the statutory limit, or at a greater speed than is reasonable and prudent under the conditions then existing, the mere fact that a child suddenly runs in front of the moving vehicle, does not necessarily relieve the driver from liability. There still remains the question whether the negligent driving of the automobile made it impossible for the driver of the car, under the circumstances, to avoid the accident after seeing the child, or whether by the exercise of reasonable care, such driver could have seen the child in time to avoid the injury."

[14] See note 3 *supra*.

[1] 190 F. 2d 917 (4th Cir. 1951).

reversed, holding that under North Carolina law the evidence of custom should have been admitted, and that the negligence of defendant and contributory negligence of plaintiff were questions for the jury.[2]

It is well settled in North Carolina that violation of a municipal ordinance is negligence per se.[3] However, such violation, in order to be actionable, must be the proximate cause of plaintiff's injury.[4] Absent contributory negligence as a matter of law, the question of defendant's negligence is submitted to the jury if the violation of the ordinance can reasonably be found to be the proximate cause of plaintiff's injury.[5] The North Carolina Supreme Court makes no mention of the general rule requiring plaintiff to be a member of a class for whose benefit the ordinance was enacted, or requiring the injury to be of a type which the ordinance was designed to prevent.[6] It is likely that the court considers these items of statutory construction under its broad treatment of proximate cause.

The general rule in North Carolina is that evidence as to custom is admissible.[7] Where such evidence can be shown to impose a duty or

[2] In Texas & New Orleans R. R. v. Owens, 54 S. W. 2d 848 (Tex. Civ. App. 1932), under exactly the same fact situation, it was held that evidence of custom was properly admitted for the determination of the jury in deciding both defendant's negligence and plaintiff's contributory negligence since the custom of long standing imposed upon defendant the duty to be on the lookout for such persons and to use due care to avoid injury to them.

[3] Hendrix v. Southern Ry., 198 N. C. 142, 150 S. E. 873 (1929); Dickey v. Atlantic Coast Line R. R., 196 N. C. 726, 147 S. E. 15 (1929); Cherry v. Atlantic Coast Line R. R., 186 N. C. 263, 119 S. E. 361 (1923); Newton v. Texas Co., 180 N. C. 561, 105 S. E. 433 (1920); Ledbetter v. English, 166 N. C. 125, 81 S. E. 1066 (1914).

[4] Arnold v. Owens, 78 F. 2d 495 (4th Cir. 1935); Holderfield v. Rummage Bros., 232 N. C. 623, 61 S. E. 2d 904 (1950); White v. North Carolina R. R., 216 N. C. 79, 3 S. E. 2d 310 (1939); Hendrix v. Southern Ry., 198 N. C. 142, 150 S. E. 873 (1929).

"When more than one inference may be drawn, proximate cause is a question for the jury. But where there is no dispute as to the facts, and such facts are not reasonably capable of more than one inference, it is the duty of the judge to instruct, as a matter of law, whether the injury was the proximate result of the negligence of defendant." Note, 7 N. C. L. REV. 482 (1929).

[5] Norfolk & Western Ry. v. Hauser, 211 Fed. 567 (4th Cir. 1913); Boles v. Hegler, 232 N. C. 327, 59 S. E. 2d 796 (1950); Humphries v. Queen City Coach Co., 228 N. C. 399, 45 S. E. 2d 546 (1947); Rea v. Simowitz, 225 N. C. 575, 35 S. E. 2d 871 (1945); Anderson v. Atlantic Coast Line R. R., 161 N. C. 462, 77 S. E. 402 (1911). See cases cited in note 4 *supra*.

[6] PROSSER, TORTS 274 (1941); RESTATEMENT, TORTS §286 (1934); Notes, 15 BROOKLYN L. REV. 246 (1946); 37 KY. L. J. 358 (1949); 7 N. C. L. REV. 482 (1929).

[7] Custom for railroad tracks to be used by pedestrians as walkway, Powers v. Norfolk Southern R. R., 166 N. C. 599, 82 S. E. 972 (1914), Thompson v. Aberdeen & A. R. R., 149 N. C. 155, 62 S. E. 883 (1908), McCall v. Southern Ry., 129 N. C. 298, 40 S. E. 67 (1901); Beck v. Southern Ry., 146 N. C. 455, 59 S. E. 1015 (1907) (custom of employees to cross between railroad cars standing on yard); Ray v. Aberdeen & R. R.R., 141 N. C. 84, 53 S. E. 622 (1906) (persons accustomed to stand or move about in railroad yard); Bradley v. Ohio River & C. Ry., 126 N. C. 735, 36 S. E. 181 (1900) (custom of defendant never to back train over crossing after passing it); Hamilton v. Southern Ry., 200 N. C. 543, 158 S. E. 75, *cert. denied*, 284 U. S. 636 (1931) (custom of making light repairs to freight cars on "exchange tracks"); McClellan v. North Carolina R.R., 155 N. C. 1, 70

obligation upon defendant, it is a factor in determining defendant's negligence in an alleged breach or omission of such duty.[8] Since persons at public railroad crossings are not trespassers,[9] the railroad owes more than a duty not to willfully or wantonly injure them; it must exercise due care for their safety.[10]

Assuming that in the *Stratton* case plaintiff was negligent in climbing between the cars, it seems that the doctrine of last clear chance[11] might have been applied since defendant, in view of the long standing custom, owed a duty to warn plaintiff before starting the train. In North Carolina, it is not essential that defendant have actual knowledge of the danger to plaintiff, if, by the exercise of reasonable care, the peril could have been discovered.[12]

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Parole—Gain Time Credits Forfeited Upon Revocation

In a recent *habeas corpus* proceeding in Florida, the petitioner sought release from confinement on the theory that his sentence had expired. At an earlier date he had been released on parole, and upon violation of the conditions of his parole he had been returned to prison to serve the unexpired portion of his sentence. He now contended that his sentence had been served, by computing for credit, in addition to the time actually served in prison, (1) the period he was at large on parole, and (2) gain time for good conduct granted prior to date of parole. *Held,* in reversing the trial court which granted the petition, neither the time spent on parole nor the gain time for good conduct granted prior to parole serve to reduce the time imposed by the original sentence.[1]

S. E. 1066, 33 L. R. A. (N. S.) 988 (1911) (custom of sounding gong as warning to persons between gates on railroad track before lowering gates).

Cf. Virginia Electric & Power Co. v. Carolina Peanut Co., 186 F. 2d 816 (4th Cir. 1950), where evidence of custom was held for determination of the jury only where there is other evidence from which jury could properly conclude that defendant used ordinary care.

[8] Hamilton v. Southern Ry., 200 N. C. 543, 158 S. E. 75, *cert. denied,* 284 U. S. 636 (1931); STANSBURY, NORTH CAROLINA EVIDENCE §95 (1946).

[9] "Where a railroad track crosses a public highway, both a traveler and the railroad have equal rights to cross. . . ." Johnson v. Seaboard Airline Ry., 163 N. C. 431, 79 S. E. 690 (1913). Missouri *ex rel.* Bush v. Sturgis, 281 Mo. 598, 221 S. W. 91 (1920).

[10] Johnson v. Seaboard Airline Ry., 163 N. C. 431, 79 S. E. 690 (1913). "A railroad company which blocks a crossing . . . for a longer time than the law permits has been held to become itself a trespasser, and to be estopped to say that one who attempts to climb over its cars is a trespasser. . . ." 44 AM. JUR. 743-744 (1942).

[11] Bogan v. Carolina Central R. R., 129 N. C. 154, 39 S. E. 808 (1901).

[12] Mount Olive Mfg. Co. v. Atlantic Coast Line R. R., 233 N. C. 661, 65 S. E. 2d 379 (1951); Aydlett v. Keim, 232 N. C. 367, 61 S. E. 2d 109 (1950); Ingram v. Smoky Mountain Stages, Inc., 225 N. C. 444, 35 S. E. 2d 337 (1945); West Const. Co. v. Atlantic Coast Line R. R., 185 N. C. 43, 116 S. E. 3 (1923); Ray v. Aberdeen & R. R. R., 141 N. C. 84, 53 S. E. 622 (1906).

[1] Mayo v. Lukers, 53 So. 2d 916 (Fla. 1951).