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# NEGLIGENCE - VIOLATION OF STATUTE AS NEGLIGENCE PER SE - EXCEPTIONS TO THE DOCTRINE

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NEGLIGENCE — VIOLATION OF STATUTE AS NEGLIGENCE PER SE — EXCEPTIONS TO THE DOCTRINE — Plaintiff's intestate was driving along the main thoroughfare when *B* drove into the main highway from a side street without stopping, thereby colliding with the automobile of the intestate. Two days prior to this accident an automobile owned by *S* negligently collided with one of the defendant's buses with the consequence that defendant's bus, without negligence on defendant's part, knocked down an arterial stop sign. This stop sign had been erected at the intersection of the main highway and the side street out of which *B* drove his car. A Washington statute made anyone who should deface, mutilate, tear down, or destroy any public signboards or guide posts, or danger signals or warnings, guilty of a misdemeanor.[1] The trial court instructed the jury to the effect that they should find for plaintiff if they found that defendant, having knocked the signal down without negligence on its part, should reasonably have discovered the destruction and reported it to the proper authorities. Defendant objected to the use of the phrase "without negligence" and made a motion for new trial. *Held*, the motion should have been

[1] Wash. Rev. Stat. (Rem. 1922), §§ 6308, 6310 (since superseded by new vehicle code). As a question of statutory construction, the court conceivably could have found that the statute was not violated by defendant, that there was no jury question. It could have held that *B* violated the statute. As analogous to this situation, compare Smith v. Stone, Style 65, 82 Eng. Rep. 533 (1647), where defendant who was carried on plaintiff's land was held not guilty of trespass.

granted. *Baldwin v. Washington Motor Coach Co.*, (Wash. 1938) 82 P. (2d) 131.

The Washington court is fully committed to the negligence per se doctrine.[2] Although recognized by the court in the principal case, the doctrine was held inapplicable to these facts. The statute relied upon here did not in terms give rise to civil liability, but it is arguable that there is an equivalent common-law duty [3] and the court tacitly assumed that, given the proper set of facts, a violation of the statute would be negligence per se. There are many limitations on the application of the doctrine of negligence per se. In construing a statute which does not give a civil cause of action in terms, the court must find such intention by implication.[4] It must also find that the plaintiff was a member of the class intended to be benefited by the statute.[5] It must find that the injury incurred was one against which the statute intended to protect.[6] The principal case seems

[2] Twedt v. Seattle Taxicab Co., 121 Wash. 562, 210 P. 20 (1922); Wilson v. Puget Sound Elec. R. R., 52 Wash. 522, 101 P. 50 (1909). A few states hold the violation to be evidence of negligence. Kimball v. Davis, 117 Me. 187, 103 A. 154 (1918); Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N. W. 883 (1917). At least one other jurisdiction holds the violation to be prima facie negligence. Ward v. Meredith, 220 Ill. 66, 77 N. E. 118 (1906). See HUDDY, AUTOMOBILES, 6th ed., § 297 ff. (1922); 45 C. J. 714 ff. (1928). But even disregarding the statute, defendant could be held liable to plaintiff on an interpretation of the facts to the effect that defendant had a duty not to negligently knock down a warning signal or if he did knock it down without negligence a duty to replace it if he should reasonably have discovered it.

[3] It is understandable that a court might imply from a statute the creation of a civil cause of action when there is an applicable common-law duty, but it is difficult to see how courts can say that a statute creates a duty when it does not in terms purport to do so and when there is no equivalent common-law duty. When the statute is silent as to this matter, the plaintiff does not sue on the statute. It is merely a piece of evidence, even though it may be conclusive. In theory it is only a yardstick for the measurement of breach of duty. It takes over the jury's function of saying whether the defendant came up to the reasonable man standard. It would be very simple for the legislature to create the duty in terms if they so desired. However, courts often disregard this distinction. Racine v. Morris, 201 N. Y. 240, 94 N. E. 864 (1911); Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543 (1889).

[4] It is sometimes stated that the court must find an intent to benefit a class as opposed to the general public. Taylor v. Lake Shore & Mich. S. R. R., 45 Mich. 74, 7 N. W. 728 (1881); Fielders v. North Jersey St. R. R., 68 N. J. L. 343, 53 A. 404, 54 A. 822 (1902); Tingle v. Chicago, B. & Q. R. R., 60 Iowa 333, 14 N. W. 320 (1882). But it involves non sequitur reasoning to find from this an intent to give a civil cause of action. Lowndes, "Civil Liability Created by Criminal Legislation," 16 MINN. L. REV. 361 (1932).

[5] HARPER, TORTS, § 78 (1933); Kelly v. Muhs Co., 71 N. J. L. 358, 59 A. 23 (1904); Bogdan v. Pappas, 95 Wash. 579, 164 P. 208 (1917).

[6] Gorris v. Scott, L. R. 9 Ex. 125 (1874); Denton v. Missouri, K. & T. R. R., 90 Kan. 51, 133 P. 558 (1913). Some cases explain the results in terms of causation. Falk v. Finkelman, 268 Mass. 524, 168 N. E. 89 (1929); Boronkay v. Robinson & Carpenter, 247 N. Y. 365, 160 N. E. 400 (1928). For a criticism of the rule of the Gorris case, see Morris, "The Relation of Criminal Statute to Tort Liability," 46 HARV. L. REV. 453 at 473 (1933).

superficially to add a further and, at the same time, contradictory limitation, i.e., that violation of a statute will not be negligence per se if there is actually an entire lack of negligence. One possible explanation of this is to say that where the statute is but technically violated, and where there is entire lack of fault, the court will engraft an exception on the doctrine. But even without emasculating the rule with exceptions, the result here is perfectly justifiable. In the great majority of cases this entire doctrine, along with its requirements, is merely a matter of statutory construction.[7] And, as the court found in this case, it is but a short step from finding civil liability on the grounds of statutory construction to denying it on the same grounds. A court should experience no difficulty in finding that the legislature by implication meant to except from civil liability the defendant who is entirely free from fault.[8] The arguments advanced by the protagonists of the doctrine fail in such a case. Professor Thayer's argument that one is negligent if he violates a statute, because no reasonable man would do what the public's representatives declared unlawful, loses much of its force when the one charged has violated the statute without actual negligence or knowledge.[9] Except for the child labor cases,[10] the decision in this case is supportable not only by reason but by analogy and precedent.[11] Obviously the easiest set of facts raising an excuse for violation of the statute includes the existence of an emergency.[12] Other courts have held the violation excused in the absence of an emergency but where there was an entire lack of negligence in and control over the situation.[13] The principal case would fall in this category. Others have gone still further and excused violation where the party charged had some control over the situation but where any action but that taken would have been

[7] See 2 TORTS RESTATEMENT, §§ 286-288 (1934); Schneider, "Negligence by Violation of Laws," 11 BOST. UNIV. L. REV. 217 (1931); Conder v. Griffith, 61 Ind. App. 218, 111 N. E. 816 (1915).

[8] Of course, this may be said to be reading into the statute a civil cause of action and reading it out again. Analogous to this situation is one wherein a public officer commits a tort in violation of a statute. Lilly v. West Virginia, (C. C. A. 4th, 1928) 29 F. (2d) 61; 49 HARV. L. REV. 154 (1935).

[9] Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317 (1914).

[10] Stehle v. Jaeger Automatic Machine Co., 225 Pa. 348, 74 A. 215 (1909). These cases may be said to impose absolute liability, but are justified on the ground that it is very simple for a defendant to manufacture a defense in such a case.

[11] There is favorable dictum in the following cases: Butler v. Hyperion Theatre Co., Inc., 100 Conn. 551, 124 A. 220 (1924); Metcalf v. Mud Bay Logging Co., 170 Wash. 59, 15 P. (2d) 278 (1932); Keller v. Breneman, 153 Wash. 208, 279 P. 588 (1929).

[12] Burlie v. Stephens, 113 Wash. 182, 193 P. 684 (1920); Johnson v. Prideaux, 176 Wis. 375, 187 N. W. 207 (1922). In Walker v. Lee, 115 S. C. 495, 106 S. E. 682 (1921), it was said that it would even be negligence in some cases not to violate the statute, but there was a strong dissent. Cf. Cooke v. Jerome, 172 N. C. 626, 90 S. E. 767 (1916).

[13] Dohm v. Cardozo & Bros., 165 Minn. 193, 206 N. W. 377 (1925). In this case plaintiff skidded to the left of the center of the road in violation of a statute. See also Burlie v. Stephens, 113 Wash. 182, 193 P. 684 (1920).

unreasonable.[14] One court has even excused the non-compliance where reasonable alternative action had been taken.[15] These decisions are in accord with the general theory that fault, while not always a necessary element of criminal liability, is the basic principle of tort recovery.[16]

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[14] Taber v. Smith, (Tex. Civ. App. 1930) 26 S. W. (2d) 722; Conder v. Griffith, 61 Ind. App. 218, 111 N. E. 816 (1915). The last case especially emphasizes statutory construction.

[15] Malloy v. New York Real Estate Assn., 156 N. Y. 205, 50 N. E. 853 (1898). Here the statute required the use of a bar across elevator shafts and defendants used a chain. But see Kavanagh v. New York, O. & W. R. R., 196 App. Div. 384, 187 N. Y. S. 859 (1921).

[16] Morris, "The Relation of Criminal Statutes to Tort Liability," 46 HARV. L. REV. 453 at 457 (1933). *Quaere*, whether the facts of the present case do not present a perfect example of Professor Morris' classification of tort liability for breach of a criminal statute accompanied by an entire lack of fault.