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NEGLIGENCE PER SE

Two Texas Supreme Court cases in 1947 involved civil liability for violation of "police regulation" type criminal statutes. In *Mundy v. Pirie-Slaughter Motor Co.*[1] the driver's license law[2] was for the first time in Texas interpreted as fixing a legislative standard of conduct requiring the prudent man to refrain from knowingly allowing his car to be driven by an unlicensed driver. In *Schumacher v. City of Caldwell*[3] plaintiff was allowed to recover from the city for the negligent killing of his cow in spite of the fact that the animal, when killed, was at large in apparent violation of a city ordinance. This mitigation of the severity of the negligence *per se* doctrine was accomplished by interpreting the city ordinance in such a manner that the plaintiff was held not to have violated it and hence not contributorily negligent.

In the *Pirie-Slaughter* case, the plaintiff sought to recover damages resulting from a collision between his tractor-mower and the defendant's truck driven by defendant's unlicensed minor employee, who was acting outside the scope of his employment at the time of the accident. The plaintiff sought to plead and prove that the driver of defendant's truck did not have a driver's license and that defendant knew or should have known this fact. The trial court sustained a special exception to the pleading and excluded the evidence on the ground that it was irrelevant, since the lack of a driver's license could not have been the proximate cause of the accident. This action was affirmed by the Court of Civil Appeals. The Supreme Court, in an opinion by Justice Hart, reversed and remanded, holding that the pleading was proper and the evidence should have been admitted.

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[1] ..... Tex. ....., 206 S. W. (2d) 587 (1947).

[2] TEX. REV. CIV. STAT. ANN. (Vernon's, 1925) art. 6687b, §§ 2, 10, 36, 44.

[3] ..... Tex. ....., 206 S. W. (2d) 243 (1947), Note, 26 TEX. L. REV. 681 (1948).

The courts of other jurisdictions have given various legal effects to the fact that the owner knew the operator did not have a license. Decisions have varied from the position that such knowledge is no evidence whatever that the owner is negligent[4] to the other extreme of holding that violation of a statute prohibiting the owner from entrusting his car to an unlicensed driver is negligence *per se*.[5] Of course even in such jurisdictions it is still necessary for the plaintiff to prove that the driver of the car was negligent and that such negligence was the proximate cause of the accident.[6] Some courts have taken the middle ground, holding that such knowledge is merely some evidence or prima facie proof of the owner's negligence.[7]

Texas is committed to the view that violation of a criminal statute is negligence *per se*,[8] not merely evidence of negligence. Violation of a criminal statute entails civil liability if it appears that the purpose of the statute was to set up a standard of conduct for the protection of the class of persons to which the plaintiff belongs against the type of harm which the statute seeks to remedy.[9] In his opinion, Justice Hart held that the purpose of the driver's license statute was "to secure a minimum of competence and skill for drivers of automobiles and to fix a standard of conduct for persons lending their automobiles to others to drive, and that its principal aim is to afford some protection to the inter-

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[4] *E. g.*, Opple v. Ray, 208 Ind. 450, 195 N. E. 81 (1935). Kentucky even went so far as to declare unconstitutional a statute making lack of license prima facie evidence of negligence, on the ground that lack of a license had no "natural and rational evidentiary relation to—or a logical tendency to prove the principal fact" of negligence. Tipton v. Estill Ice Co., 279 Ky. 793, 132 S. W. (2d) 347 (1939).

[5] *E. g.*, Cirosky v. Smathers, 128 S. C. 358, 122 S. E. 864 (1924); Walker v. Klopp, 99 Neb. 794, 157 N. W. 962 (1916). See Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

[6] Jacobs v. Hobson, 148 Kan. 107, 79 P. (2d) 861 (1938).

[7] *E. g.*, Gordon v. Bedard, 265 Mass. 408, 164 N. E. 374 (1929); Austin v. Rochester Folding Box Co., 111 Misc. 292, 181 N. Y. S. 275 (Sup. Ct. Spec. Term, 1920). See Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN L. REV. 361 (1932).

[8] Davis v. Estes, 44 S. W. (2d) 952 (Tex. Com. App. 1932); Alpine Telephone Corp. v. McCall, 143 Tex. 335, 184 S. W. (2d) 830 (1944).

[9] Mundy v. Pirie-Slaughter Motor Co., 206 S. W. (2d) 587 at 590.

ests of other persons on or near the public highways."[10] Two considerations apparently required this holding: (1) the statute requires the applicant to pass an examination testing his fitness and ability to operate motor vehicles on the public highways; (2) the emergency clause of the enacting statute declared an emergency by reason of the fact that the existing law was then inadequate "to curb the increasing fatalities due to improper driving."[11] The court distinguished the driver's license statute from those statutes requiring licenses for identification or revenue purposes only, such as the automobile registration statute. Violation of the latter class of statutes would not, of course, entail civil liability.

In the course of his opinion, Justice Hart pointed out that the statute would not be violated unless it were shown that the defendant knew the driver had no license. However, negligence *per se* aside, the plaintiff would still be entitled to plead and prove that the defendant was negligent in the ordinary sense in that he should have known that fact.

In view of the court's clear declaration of the purpose of the driver's license statute, the door may be open to a holding that the driver who lacks a license is himself negligent *per se*. It is difficult to conceive, however, how a careful driver's lack of a license could be either the cause in fact or the legal cause of a plaintiff's damage.

Schumacher v. City of Caldwell[12] illustrates one method by which the Texas Supreme Court, in spite of being committed to the doctrine of negligence *per se*, has found it possible to evade the doctrine where such evasion is necessary to reach a just result. The plaintiff's cow, tethered by a chain fastened to a car axle driven in the ground on the plaintiff's property in the city of Caldwell, became frightened during a thunderstorm, broke the chain and escaped. She was electrocuted by a high-tension wire

[10] *Ibid.*
[11] *Ibid.*
[12] 206 S. W. (2d) 243 (1947).

which had been broken during a storm three days previously. The city had permitted this wire to remain on the ground. There was a city ordinance making it unlawful for cattle to run at large in the city limits. The trial court gave judgment for plaintiff for $135. The Galveston Court of Civil Appeals reversed[13] and held that the city was not liable because the animal was running at large in violation of a city ordinance when the injury occurred, which was contributory negligence *per se*.[14]

The Supreme Court reversed the Court of Civil Appeals and affirmed the recovery allowed by the trial court. The court stated that had the owner violated the city ordinance by *permitting* his cow to run at large the city would be liable only for gross negligence in causing the death of the cow. However, in this case the cow escaped through no fault of the owner. Therefore the city was held liable for ordinary negligence in causing the cow's death. In reaching its decision the court relied upon a Texas Supreme Court case[15] and a civil appeals case[16] construing county stock laws as requiring *fault* of the owner in *permitting* the stock to run at large to establish violation. The court also cited two civil appeals cases[17] to the same effect involving municipal ordinances prohibiting animals from running at large.

The Texas Supreme Court is definitely opposed to any further extension of the doctrine of liability without fault.[18] An obdurate application of the doctrine of negligence *per se* to situations where the violation of the statute is clearly reasonable under the circumstances, however, results in the imposition of liability without fault. The "fault" in such exceptional cases is technical only.[19] In

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[13] On authority of Dallas Gas Co. v. Wheat, 160 S. W. 980 (Tex. Civ. App. 1913), *no writ of error history.*

[14] 204 S. W. (2d) 471 (1947).

[15] Texas & Pacific R. Co. v. Webb, 102 Tex. 210, 114 S. W. 1171 (1908).

[16] Ft. Worth & D. C. R. Co. v. Decatur Cotton Seed Oil Co., 179 S. W. 1104 (1915).

[17] Ellis v. Lewis, 142 S. W. (2d) 294 (1940); Presnall v. Raley, 27 S. W. 200 (1894).

[18] Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S. W. (2d) 221 (1936).

[19] Thus, when a collision with a child on skates can apparently be avoided by pulling to the left side of the road, it would be folly to obey the statute by holding to the right. Burlie v. Stephens, 113 Wash. 182, 193 P. 684 (1920).

a number of cases[20] the Texas Courts of Civil Appeals have refused to apply the doctrine of negligence *per se* to such situations.[21] Such holdings have gained widespread approval.[22] Doubt has been cast on their weight, however, by a recent civil appeals decision in which the court refused to consider whether the defendant had acted reasonably in the face of an admitted violation of a traffic law.[23]

The *Schumacher* case represents an alternative technique by which the injustice of an indiscriminate application of the negligence *per se* doctrine may be avoided. The criminal statute is interpreted as requiring culpability as an element of the offense, even though it does not in terms do so, and is clearly one of that class of police regulations in which culpability is immaterial in criminal prosecutions. Fear has been expressed that such interpretation of a criminal statute in a civil case may embarrass criminal prosecutions under such statutes.[24] It is submitted, however, that in view of our dual supreme court system there is little likelihood that criminal courts will regard themselves as bound by such decisions in civil proceedings.

NUISANCE

One 1947 case re-emphasizes that it is not necessary to prove negligence in order to recover for a private nuisance. In the case of *Columbian Carbon Co. v. Tholen*,[25] the plaintiff recovered in

[20] See list of "excused violation" cases in Note, 25 TEX. L. REV. 424 (1947).

[21] Thus in Taber v. Smith, the lights failed on the defendant's truck. Diligent search failed to disclose a garage which could send a tow-car that night. The truck was a hazard as it stood. There was a garage only 400 feet away, however. Defendant therefore ordered his servant to proceed with the truck at slow speed, on the extreme right of the road, to the garage. While proceeding in such fashion the plaintiff collided with the rear of the truck and sued for damages. The plaintiff recovered in the trial court because the technical violation of the statute prohibiting operation without lights was considered negligence *per se*. The court of civil appeals reversed on the ground that the defendant exercised due care under the circumstances. 26 S. W. (2d) 722 (1930).

[22] Note, 25 TEX. L. REV. 424 (1947). Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 459 (1932).

[23] Herrin v. Falcon, 198 S. W. (2d) 117 (1946), *writ of error refused, N. R. E.*

[24] Note, 26 TEX. L. REV. 681, 682 (1948).

[25] 199 S. W. (2d) 825 (Galveston Ct. of Civ. App., 1947), *writ of error refused.*

the trial court on the theory that the defendant's operation of his carbon black plant, which resulted in the deposit of soot on plaintiff's home, was a private nuisance. The plaintiff did not attempt to allege or prove negligence. The defendant attacked this recovery in the court of civil appeals on the ground that negligence of the defendant was necessary to support such recovery. The court held that negligence is not necessary to support recovery for nuisance, except where the act or condition complained of can become a nuisance solely by reason of the negligent manner in which it is performed or permitted. This accords with the reasoning of Prosser[26] and the *Restatement of Torts*[27] that nuisance is properly a field of tort liability referring to the type of interest (use or enjoyment of land) invaded rather than a type of tortious conduct. Nuisance may result from conduct intended to cause harm, from negligent conduct, or from ultrahazardous activity even though carefully performed. In the principal case, as in the great majority of nuisance cases, the conduct was intentional. It was a nuisance because the jury found it to be an unreasonable interference with the plaintiff's use and enjoyment of his land.

Negligence as a Matter of Law (Railroad Crossing Accidents)

Whether certain conduct constitutes negligence or contributory negligence or not is of course usually a question of fact for the jury. Occasionally, however, where the facts are undisputed and only one reasonable inference can be drawn, the courts declare negligence to exist as a matter of law, regardless of jury findings. Such cases are always of interest to lawyers, since they purport to lay down a rule of law. They appear to add an element of certainty to the uncertain field of negligence. The appearance is misleading, as is shown by the short life of the "stop, look, and if necessary get out of the vehicle" rule announced by Mr. Justice

[26] Prosser on Torts 553 (1941).

[27] Scope and Introductory Note to Chapter 40, Restatement of Torts 215 (1939).

Holmes in the *Goodman* case.[28] Mr. Justice Holmes purported to lay down his rule "once for all," but only seven years later the decision of that case was limited to its particular facts. The rule requiring the prudent man to get out of his vehicle if his view of the crossing was obstructed was held to have been dictum and was disapproved.[29]

In the 1947 Texas Supreme Court case of *Texas & N. O. R. Co. v. Burden*[30] the majority of the court reversed a recovery by the plaintiff for the death of her husband, holding that the decedent was guilty of contributory negligence as a matter of law. The accident occurred at a public crossing in the town of Diboll. A freight train was stopped on a siding to await the passing of a passenger train. The freight train was cut in two at the crossing to permit traffic to pass. The front car of the rear section of the freight train was an immigrant car. The decedent held a conversation with the caretaker of the immigrant car. According to the caretaker, the deceased remarked that it was about time for Number 25 to pass through, and he would have to be going; he stepped around the front of the car and onto the main track, where he was killed by the passenger train. A colored brakeman stationed at the crossing to stop traffic called to him to stop. The decedent looked toward the brakeman, then hurried his step, or, according to the brakeman, jumped onto the main track into the path of the passenger train. The jury found the defendant railroad negligent in various respects, such as excessive speed and failure to sound a bell and whistle at the proper times. They also found that the deceased was not negligent. The lower court gave judgment for substantial damages. The recovery was approved by the Beaumont Court of Civil Appeals.[31]

The majority of the Supreme Court held[32] that the testimony

[28] Baltimore & Ohio R. R. v. Goodman, 275 U. S. 66 (1927).

[29] Pokora v. Wabash R. Co., 292 U. S. 98 (1934).

[30] 146 Tex. ....., 203 S. W. (2d) 522 (1947).

[31] 196 S. W. (2d) 707 (1946).

[32] With Chief Justice Alexander and Justices Taylor, Sharp and Simpson dissenting.

of the caretaker of the immigrant car conclusively established that the deceased knew of the approach of the train; that the only reasonable interpretation, therefore, of his actions after the warning by the brakeman was that he decided to substitute his judgment for that of the brakeman; that such conduct was an utter failure to use any care for his own safety and was contributory negligence as a matter of law.[33]

The dissent was based partly on the questionable nature of the majority holding that, in effect, the jury were required to believe the uncontradicted testimony of the caretaker tending to prove that the deceased knew the train was coming. This, however, is not the place for a discussion of the law of evidence on the province of the jury in weighing evidence and determining credibilty of witnesses.[34]

The dissent also took issue with the conclusion that contributory negligence was established as a matter of law. There was evidence tending to show that the freight train made a noise as if it were about to couple up just as the deceased passed between the two parts of the freight train. It was, therefore, entirely possible that the attention of the deceased was distracted from the real source of danger by this noise and by the brakeman's warning. He may have interpreted the warning as being against the danger of being crushed between the two parts of the freight train. This theory would explain why he hurried away from the side track and onto the main track. If the jury believed this to be the true state of facts, as apparently they did, they properly found that the decedent was not negligent.[35]

It would appear that reasonable minds could differ as to the conclusions to be drawn form the evidence. It seems, then, that the majority erred in laying down a rule of prudent conduct where the situation of the deceased is in dispute. Is it not possible that

[33] Citing Gulf C. & S. F. Ry. Co. v. Gaddis, 208 S. W. 895 (Tex. Com. App. 1919) as controlling authority.

[34] For a discussion of this aspect of the case, see the section on Evidence, this issue.

[35] See Kirksey v. Southern Traction Co., 110 Tex. 190, 217 S. W. 139 (1919).

a prudent man, believing what the evidence shows the decedent may have believed, would have acted precisely as he did? If so, then the question of his negligence should have been left with the jury.

C. R. W.