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The Breach of a Penal Statute Which Has for Its Purpose the Protection of the Individual Members of the General Public as Evidence of Negligence

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Usually no trust was mentioned or contemplated. The reason for such strained reasoning is that in England a party cannot recover on a contract made for his benefit if he is not a party to the contract, and the courts frequently torture such cases into trusts to avoid a harsh result. The admission of these facts by the English Courts is indicated by the fact that later cases renounce the trust theory.

The test whether there is a trust or a third party beneficiary contract would seem to be whether the payee is to collect the money under a duty as trustee and pay the proceeds to a third person, while performing all the other duties of a trustee; or whether the third person can collect the money. The other duties of a trustee would be to keep the trust money separate from his own and care for it for the benefit of the beneficiary. This would not make the beneficiaries in circumstances similar to the Luce case cestuis of a trust, as it might seem at first glance, for the parent or guardian acts for them in collecting the money and any action brought is treated as that of the child.

It is submitted that the Luce case is wrong and conflicts moreover with the weight of authority. This is an ordinary case of a third party beneficiary which is sometimes confused with a trust.

E. R. Webb

THE BREACH OF A PENAL STATUTE WHICH HAS FOR ITS PURPOSE THE PROTECTION OF THE INDIVIDUAL MEMBERS OF THE GENERAL PUBLIC AS EVIDENCE OF NEGLIGENCE

A recent California case raises a matter which has caused a great deal of disagreement and uncertainty among the different courts in the field of Torts. Plaintiff was driving her car and attempted to make a left turn. Defendant’s street car approached at a speed in excess of the maximum speed provided for by statute and collided with the car. The opinion in deciding for the plaintiff said:

“If the jury believed that the defendant, Sherman was traveling at a rate of speed in excess of 15 miles an hour, and according to his own testimony he was so traveling—the defendant’s negligence was established. The violation of an ordinance or statute is negligence per se.”

Corbin, Contracts for the Benefit of Third Persons (1930) 46 Law Quarterly Review 12, 17; Note (1932) 81 A. L. R. 1271, 1272.


Corbin, Contracts for the Benefit of Third Persons (1930) 46 Law Quarterly Review 12, 17; Note (1932) 81 A. L. R. 1271, 1272.


Ibid.

Ibid. and sec. 14.

K. L. J.—9
The question presented here which it is our purpose to discuss is what weight does the breach of a penal statute which has for its purpose the protection of the individual members of the general public have as evidence in determining the negligence of the defendant. Is such a breach conclusive evidence of negligence, prima facie evidence of negligence, or mere evidence of negligence? A discussion of these three questions should clarify the role played by penal statutes and their violation in regard to negligence. Breach of a municipal ordinance is usually treated in the same way a breach of a penal statute is treated in the different jurisdictions.

I

NEGLIGENCE PER SE

If the breach of a penal statute which has for its purpose the protection of the individual members of the general public is termed conclusive evidence of negligence it is negligence per se. By negligence per se is meant negligence which a court can determine to be negligence without submitting the question to the jury.

The case of *Teche Lines v. Bateman* illustrates the situation where the breach of a penal statute is so considered. Here the statute forbade the operation of a vehicle on the open highway at a greater speed than forty miles per hour. The plaintiff while riding with her husband was struck in the eye by a rock thrown by defendants bus. The bus was operating at a speed in excess of the statutory limit and the court held that, "Where the violation of a specific

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2 No attempt will be made in this discussion to present the view that the breach of a statute is no negligence but is the breach of a legal duty which is to be distinguished from the legal duty set up by the common law. This view is best illustrated by the New Hampshire case of *Frost v. Stephens*, 88 N. H. 164, 184 Atl. 869 (1936) which says: "Causal violation of a statute is a legal fault. So also is causal violation of the common law standard of due care. Both are legal faults, but only the latter is negligence. There is no corresponding term for the violation of a statutory standard of conduct. The term legal fault includes both violations, the term negligence does not. It follows that, strictly speaking, the term negligence should be used only to refer to that sort of legal fault which consists of violation of the common law standard."


4 162 Miss. 404, 139 So. 159 (1932).
statute causes injury, and where such injury can reasonably be anticipated, or some injury can be anticipated, from such violation, liability for the injury accrues."

A great majority of the courts follow the rule laid down in this case, that the breach of a penal statute which has for its purpose the protection of the individual members of the general public is negligence per se. The effect of such a rule is that when the defendant breaches a penal statute of this nature, he is guilty of negligence. In reaching this result the courts have recognized the standard established by the legislature and have accorded it their strongest method of enforcement.

The decisions in Kentucky are in accord with the majority view which says that violation of penal statutes which have for their purpose the protection of the individual members of the general public is negligence per se. In addition to the decisions holding the violation of such statutes to be negligence per se, there is a statute which provides:

"A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed."

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National Casket Co. v. Powar, 137 Ky. 156, 125 S. W. 279 (1910); Cumberland Tel. & Tel. Co. v. Yeiser, 141 Ky. 15, 131 S. W. 1049 (1910); Collett's Guardian v. Standard Oil Co., 186 Ky. 142, 216 S. W. 556 (1919); Hardware Mutual Casualty Co. v. Union Transfer & Storage Co., 205 Ky. 651, 266 S. W. 302 (1924); Pryor's Adm'r v. Otter, 268 Ky. 602, 105 S. W. (2d) 564 (1937).

Carroll's Kentucky Statutes, (Baldwin's 1936 Revision) sec. 466.
Cited under this statute is the case of Turner v. Taylor’s Adm’x\(^*\) in which the administratrix sought recovery for deaths alleged to have resulted from failure of the defendants to provide fire escapes as required by statute.\(^*\) In this case the court said in its opinion:

“The cause of action is bottomed only upon the violation of the statutes, supra, in connection with section 466 of the same Edition of the statutes, which latter gives a cause of action for the recovery of damages for injuries resulting from the violation of a statute. But neither of the statutes, nor any one within this jurisdiction, nor any declared principle of law by any court, take away from or deprive a defendant in any such action of the right to rely on the well-recognized and fundamentally established defenses to actions based on negligence, two of which are: (a) That notwithstanding the negligence of defendant, before he can be made liable therefor his negligence must be the proximate cause of the injury for which recovery is sought, and (b) that notwithstanding his negligence he is yet exonerated if the injured person’s negligence contributed to his injury and but for which it would not have happened.”

The language of the court indicates the action is based on the breach of the legal duty established by statute, and that this breach is negligence. By expressing the view that the breach of the statutory duty is negligence the court is in accord with the Restatement.\(^*\)

II

Prima Facie Evidence of Negligence

If the violation of a penal statute which has for its purpose the protection of individual members of the general public raises the presumption that the defendant has been negligent and places a burden on the defendant to overcome this presumption, it is what is termed prima facie evidence of negligence.

The case of Nadeau v. Perkins\(^*\) points out the manner in which a court may call such a breach prima facie evidence of negligence. In this case the driver in the automobile in which the plaintiff was riding struck the defendant’s truck which was parked on a highway at night without lights. Such parking was prohibited by statute. In allowing recovery the court said:

“The Legislature, through the enactment of statutes, prescribes rules designed to safeguard travelers, and provides penalties for violation of such rules. If such violation is admitted, or proven by the evidence, it is prima facie evidence of negligence, as it is sometimes said, and as otherwise expressed, raises a presumption of negligence. While not conclusive, the defendant must overcome the presumption against him.”

\(^*\) 262 Ky. 304, 90 S. W. (2d) 73 (1936).
\(^*\) While the statute which has been breached in this case is not precisely of the type this paper is attempting to discuss, the case presents an interpretation of Sec. 466 of the Statutes, footnote 7, supra, and this interpretation would be applicable to a penal statute of the nature discussed in this paper.

\(^*\) Restatement, Torts (1934) Sec. 282, Sec. 290 Comment (b).

\(^*\) — Me. —, 193 Atl. 877 (1937).
A very small minority of the courts follow the rule laid down in the above case that the breach of a penal statute which has for its purpose the protection of the individual members of the general public is prima facie evidence of negligence. A presumption of negligence is raised against a defendant who breaches such a penal statute in the jurisdictions following the rule of prima facie evidence of negligence. Just as in ordinary cases of negligence based on the common law standard of the reasonably prudent man, such presumption of negligence may be overcome by the introduction of sufficient evidence to show that the defendant was not in fact negligent. Thus, while under the rule that the breach of a penal statute which has for its purpose the protection of the individual members of the general public is prima facie evidence of negligence the burden of going forward with the proof is shifted, it is not conclusively presumed that the defendant is negligent. Here, the court in effect gives strong recognition and support to the standard established by the legislature, but does not take the standard as conclusive of the conduct of a reasonably prudent man.

III

MERE EVIDENCE OF NEGLIGENCE

If the violation of a penal statute which has for its purpose the protection of individual members of the general public is treated merely as evidence of the defendant's negligence, it is termed mere evidence of negligence.

The case of Gill v. Whiteside-Hemby Drug Company is an example of a particular instance where the court treated the violation of such a penal statute as mere evidence of negligence. In this case the defendant's employee was driving a motorcycle and passed a street car at an intersection in violation of a statute, striking the plaintiff. The plaintiff contends that the violation of the statute conclusively makes the defendant liable for negligence. The court in affirming the decision for the defendant said:

"We have frequently held that violation of a state law, or violation of a city ordinance, is merely evidence of negligence, and does not constitute negligence per se."

This court, in holding that the violation of a penal statute which has for its purpose the protection of the individual members of the general public is mere evidence of negligence, does not give much recognition to the standard established by the legislature. In many cases such conduct as would breach one of these penal statutes would constitute some evidence of negligence regardless of whether there were a statute or not.

A small number of jurisdictions say that the violation of a penal statute of the nature referred to above is evidence of negligence."

Elliott v. Montgomery, — Me. —, 197 Atl. 322 (1938); State to Use of Schiller v. Hecht Co., 165 Md. 415, 169 Atl. 311 (1933); Wold v. Gardner et al., 167 Wash. 191, 8 Pac. (2d) 975 (1932).

Ill. App.—, 26 N. E. (2d) 433 (1940).

Gaw Construction Co., — Mass.—, 15 N. E. (2d) 225 (1938);
Even though these cases say the violation of a penal statute is evidence of negligence, the result reached is the same as that reached by the cases holding such breach to be negligence per se.

Three methods of treating the breach of a penal statute which has for its purpose the protection of the individual members of the general public as evidence of negligence have been presented. The breach has been treated as mere evidence of negligence and no great weight given to the statutory standard. It has been treated as prima facie evidence creating a presumption of negligence on the part of the defendant. And it has been treated as negligence per se, making the defendant's negligence absolute. Which of these three methods will best accomplish the purpose of the statutes and at the same time deal justly with the parties?

It is submitted that, if the breach of penal statutes which have for their purpose the protection of the individual members of the general public, is treated as negligence per se by all the courts instead of a majority of them, the social end for which the statutes were passed will be substantially and justifiably implemented.

The rule that breach of such penal statutes is negligence per se, or as a matter of law, does not necessarily render the defendant liable in every case where he breaches a statute. But where the plaintiff relies on the breach of a penal statute, to recover he must prove, (1) that the statute was intended to protect him as an individual; (2) that the interest invaded is the interest the act intended to protect; (3) that the violation is the legal or proximate cause of his injury; and the defendant may prove contributory negligence to defeat the claim of the plaintiff.

Thus, we see that while the violation of penal statutes which have for their purpose the protection of the individual members of the general public, if treated as negligence per se, would make the negligence of the defendant conclusive, the defendant would not be liable every time a statute of this nature was violated. Therefore, while the social end of protection of the public would thus be attained, the defendant in such a negligence action would not be dealt with unjustly.

GLENN DENHAM

CRIMINAL PROCEDURE—CONCLUSION OF INDICTMENT

The defendant was convicted of voluntary manslaughter under an indictment which did not conclude "against the peace and dignity of the Commonwealth of Kentucky", as required by Kentucky Constitution, Section 123. No demurrer was made to the indictment.


26 Dunbar v. Olivieri, 97 Colo. 381, 50 Pac. (2d) 64 (1935).


1 Kentucky Constitution Sec. 123: "The style of process shall be, 'The Commonwealth of Kentucky.' All prosecutions shall be carried