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Torts-Violation of a Statutory Duty

TORTS—VIOLATION OF A STATUTORY DUTY.—Plaintiff, a stranger, was standing in front of defendant's truck helping make repairs at night. Defendant's truck was parked on the traveled portion of the highway without flares as required by statute.[1] A third party struck defendant's truck pushing it over plaintiff and injuring him. Held, defendant liable. *Walters v. Rowls* (Ind. App. 1938), 16 N. E. (2d) 969.

A breach of statutory duty is negligence per se[2] towards a plaintiff if the plaintiff is within the class of persons intended to be protected by the statute and if the injury sustained was the type of risk the legislature sought to prevent.[3] The problem in this case is whether the connection of the risk created by the defendant's conduct to the plaintiff's injury was within the contemplation of the legislature in enacting the statute.

The court held the plaintiff was within the class of persons intended to be protected by the statute requiring trucks parked at night on the highway to display flares. In making this determination, however, the court discussed two Michigan cases applying a statute requiring motorists approaching pedestrians on the traveled portion of the highway to slow down to ten miles per hour.[4] Purporting to reason from the analogy of this statute the court held the plaintiff came within the class of persons the Indiana statute was designed to protect.[5]

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[1] Burns' Ind. Stat. (1933), §§ 47-525 and -526; Baldwin's Ind. St. 1934, §§ 11178 and 11179.

[2] Some of the difficulty involved in this case might have been avoided by use of the minority rule that the violation of a statute is only evidence of negligence. Voiles v. Hunt (1922), 213 Iowa 1224, 240 N. W. 703; Miller v. Burch (1929), 254 Ill. App. 387; Jones v. Co-op Assn. of Amer. (1912), 109 Me. 448, 84 A. 985; Neverett v. Patch (Mass. 1936), 4 N. E. (2d) 304; Clark v. Boston & Me. R. Co. (1887), 64 N. H. 323, 10 A. 676; see Matz v. J. L. Curtis Cartage Co. (1937), 132 Ohio St. 271, 7 N. E. (2d) 220, holding that the violation of a Public Utility Commission regulation requiring flares is only evidence of negligence; Purol, Inc. v. Great Eastern System, Inc. (Pa. 1938), 197 A. 545.

See Lowndes, Civil Liability Created by Criminal Legislation, (1932), 16 Minn. L. Rev. 361, that the violation of a statute is an element of a tort resting on negligence. This rule is advanced because the failure of the legislature to provide expressly for criminal responsibility for the violation of a penal statute argues against the adoption of the per se rule. 32 Col. L. Rev. 712, contains an interesting discussion of the application of both rules.

[3] Gerlot v. Schwartz (1937), 212 Ind. 292, 7 N. E. (2d) 960. As to the class of persons intended to be protected by the statute see Kelly v. Muhs Co. (1904), 71 N. J. L. 358, 59 A. 23. As to the type of harm intended to be prevented see Gorris v. Scott (1874), L. R. 9 Ex. 125. As to the requirement that the violation of the statute must be the proximate cause of the plaintiff's injury, see Prest-O-Lite Co. v. Skeel (1914), 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A 474 (holding the violation was not proximate cause); Binford v. Johnston (1882), 82 Ind. 426. See generally, Harper, Law of Torts, § 78, p. 193.

[4] White v. Edwards (1923), 222 Mich. 321, 192 N. W. 560; Nordman v. Mechem (1924), 227 Mich. 86, 198 N. W. 586.

[5] The court said, "By analogy the intent, purpose, and dangers to be eliminated by . . . our statute were similar to those comprehended within the language of the Michigan statute. We conclude that . . . Rowls came within the class of persons intended to be protected . . ."

Although the argument from statutes by analogy is commendable,[6] the validity of the analogy in this case is questionable. The Michigan statute specifically included the protection of pedestrians;[7] until this case arose the only prior interpretation of the Indiana statute held it to include the protection of motorists traveling on the highways at night from the danger of striking trucks stalled without lights.[8] This case first presented the problem of whether the statute also included the protection of pedestrians standing off the pavement on the berm;[9] until it is established that the Indiana flare statute included the protection of that class of persons, the Michigan statute is not analogous.[10]

The resolution of this issue may be effectuated by resort to principles of statutory interpretation to determine the legislative intent[11] or by the common law doctrine of proximate cause treating the violation of a statute as negligence per se.[12] The court here chose the former method and attempted

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[6] Jamison v. Encarnacion (1930), 281 U. S. 635, 50 S. Ct. 441. See Landis, The Study of Legislation in Law Schools, (1931), 31 Harv. Grad. Mag. 433; Landis, A Note on Statutory Interpretation, (1930), 43 Harv. L. Rev. 886.

[7] The prescribed standard of conduct is stated in relation to pedestrians. "Upon approaching a person walking in the roadway of a public highway, . . . a person operating a motor vehicle shall slow down to a speed not exceeding ten miles an hour and give reasonable warning of its approach and use every reasonable precaution to insure the safety of such person." 1 Comp. Laws of Mich. 1915, sec. 4818.

[8] Gerlot v. Schwartz (1937), 212 Ind. 292, 7 N. E. (2d) 960.

[9] The Indiana statute is very similar to the following flare statutes of other states: Colo. Code (1935), Vol. II, ch. 16, sec. 266; Conn. Supp. to Gen. Statutes (1931, 1933, 1935), sec. 1598, subsec. 9; Dela. Code (1935), sec. 5641(d); Ill. Rev. Statutes (1937), Ch. 95½, sec. 218; Iowa Code (1935), sec. 5067 e 1; Kans. Statutes, (1937) Supp. sec. 8-5108; Md. Code (1935) Supp., Art. 56, sec. 193 (3A); Minn. Code (1938) Supp., sec. 11-1801; N. Y. (1935) Supp. to Cahill Consol. Laws, Ch. 64a, sec. 15(17). These do not indicate by any express words to what class of persons the protection is extended. The following cases involving flare statutes all are construed to give protection to motorists or their passengers: Gerlot v. Schwartz (1937), 212 Ind. 294, 7 N. E. (2d) 960; TWA v. Northland Greyhound (1937), 201 Minn. 234, 275 N. W. 846; Matz v. J. L. Curtis Cartage Co. (1937), 132 Ohio St. 271, 7 N. E. (2d) 220; Perry v. Reich Bros. Long Is. Motor Freight, Inc. (1937), 300 N. Y. S. 142; Gaber v. Weinberg (1936), 324 Pa. 385, 188 A. 187. This Indiana case, Walters v. Rowls, is the second case construing a flare statute to include protection to pedestrians. Engle v. Nelson (1935), 220 Iowa 771, 263 N. W. 505 allowing a plaintiff standing on the berm to recover from a motorist who swerved to avoid a truck parked without flares can be distinguished as the court there held there was a substantial compliance with the statute by the use of a flashlight as a warning. Singer v. Messina (1933), 312 Pa. 129, 167 A. 583, 89 A. L. R. 1271, involves a suit by a driver standing beside his truck who was barred by contributory negligence.

[10] That the statute is also intended to protect against other highway hazards beside striking a parked truck is apparent from the construction applied in the Engle case, note 9 supra, where the accident was caused by the motorist swerving to avoid the truck.

[11] This requires the determination of the intent of the legislature if it can be discovered, and if not discoverable, the application of rules of construction to determine what a "reasonable legislature might have intended." See Horack, In The Name of Legislative Intent, (1931), 38 W. Va. L. Q. 119.

[12] Lowndes, Civil Liability Created By Criminal Legislation, (1932), 16 Minn. L. Rev. 361; Thayer, Public Wrong and Private Action, (1914), 27 Harv. L. Rev. 317.

to establish the legislative intent by reasoning from an analogous statute. It might better have relied on a similar Indiana statute protecting pedestrians than on a repealed Michigan statute.[13]

A possible solution would be the construction of all highway statutes of the state in *pari materia,* and from an examination of the entire body of law on this subject determine the highway statutes to be enacted to eliminate all types of serious highway hazards. The court did not expressly assume this position, but the use of the Michigan statute to determine the class of persons protected by a statute is consistent only with this approach to the problem.[14]

B. W.

TRUSTS—APPORTIONMENT OF INCOME BETWEEN LIFE BENEFICIARY AND REMAINDERMAN.—The testator created nine separate trusts, one for each of eight relatives and the ninth to be known as the "Doctor E. G. Long Foundation." The net income of each of the separate trusts (other than the foundation) was to be paid to the respective beneficiaries for life[1] and on their deaths the principals were to be turned over to the foundation. On the death of one of the life beneficiaries a controversy arose as to who was entitled to the income accumulated, earned, and accrued, but undistributed at the date of the life beneficiary's death. The lower court held that all the income accumulated, earned, and accrued but undistributed should be apportioned as of the date of death and paid to her sole heir at law. On appeal, the judgment was affirmed. *St. Mary's Hospital of Evansville, Indiana v. Louis E. Long* (Ind. 1938), 17 N. E. (2d) 833.

On the death of a life beneficiary of a trust, a difficult problem as to the apportionment of income therefrom between the life beneficiary and the remainderman is presented. This is especially true when the trustee is in possession of rents, dividends, annuities, and interest monies which have accrued both before and after the termination of the life interest.

It is an elementary principle that the rights of the life tenant and the remainderman depend upon the intention of the testator which is to be gathered from the terms of the trust instrument taken as a whole and in the light of all the surrounding circumstances.[2] When such a rule of construction

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[13] See Burns' Ind. Stat. (1933), § 47-513; Baldwin's Ind. St. 1934, § 11166, which is substantially the same statute as the Michigan statute. See Mich. Comp. Laws 1929, Sec. 4696. Note that both the repealed Michigan statute and the Indiana statute referred to pedestrians on the traveled portion of the highway. See Fishman v. Eads (1929), 90 Ind. App. 137, 168 N. E. 495 allowing recovery to a pedestrian injured by the violation of this statute.

[14] The statement is frequently found in Indiana decisions involving highway statutes that the statute is for "the protection of persons and property lawfully upon the public highways of this state." See the instant case, also Koplovitz v. Jensen (1925), 197 Ind. 475, 151 N. E. 390.

[1] In the present case the life beneficiaries were to receive the income immediately after receipt thereof by the trustee, but in order to make a uniform time for payment and accounting, the life beneficiaries agreed with the trustee to be paid quarterly. (See footnote 13 for further information on this point).

[2] Eustace v. Dickey (1921), 240 Mass. 55, 132 N. E. 852; Restatement, Trusts (1935), § 235, comment f. "By the terms of the trust it may be provided that income otherwise apportionable shall not be apportioned or that income otherwise not apportionable shall be apportioned."