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William T. Muse  
*University of Richmond*

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# Negligence Per Se and the Virginia Motor Vehicle Code

WILLIAM T. MUSE

Wigmore, writing in 1911, said: "The general question . . . whether an injury caused by the defendant while violating a [criminal] statute is actionable per se is a troublesome one, open to much argument, and not yet settled by any generally accepted principle." Comment, 6 Ill. L. Rev. 350 (1911). Giving due recognition to the scholarly labors spent on this problem by writers, judges, and practitioners over the intervening almost half-century, Wigmore's observation is equally true today. In working out the proper relation between criminal statutes and tort liability the courts have generally adopted one of the following three views:

1. Violation of the criminal statute is negligence per se; the standard of conduct set by the statute is conclusive evidence of the standard to be applied in tort cases.

2. Violation of the criminal statute is irrelevant to tort liability; the standard of conduct set by the criminal statute is no evidence of the standard to be applied in tort cases. This is the extreme opposite of the negligence per se view.

3. Violation of the criminal statute is evidence of negligence; the standard set by the criminal statute is evidence of the standard to be applied in tort cases. This is a compromise between the other two views.

In Virginia all three views are followed. Cases involving the nature of the standards established by the Motor Vehicle Code in the regulation of traffic are in a state of irreconcilable confusion. Each provision of the seven chapters of the Motor Vehicle Code is explicitly a criminal statute. Va. Code Ann. §§ 46-18, 46-180, 46-385, 46-396, 46-509 (1950). These statutes contain no legislative indication that they are to have any civil

consequences whatever. It may be suggested that the confusion found in the Virginia cases is due, in part, to (1) the court's traditional technique in considering legal cause (*i.e.*, "proximate cause") as a part of the concept of negligence; (2) a finding, either expressly or impliedly, of negligence by the common law standard of "a reasonable man under the circumstances" independently of, or in addition to, the violation of the statutory standard; or (3) having submitted the whole question of defendant's liability to the jury under such circumstances as to make it impossible to determine whether the jury did accept, or was expected to accept, the statutory standard as conclusive.

The following cases seem to hold that standards of conduct required by the Motor Vehicle Code are final and conclusive, and conduct falling short of that specified in the statutes constitutes negligence per se, *i.e.*, negligence as a matter of law: *Cohen v. Meador*, 119 Va. 429 (1925) *Virginia Elec. & Power Co. v. Blount*, 158 Va. 421 (1932); *Lucas v. Craft*, 161 Va. 228 (1933); *Owen v. Dixon*, 162 Va. 601 (1934); *Roanoke Ry. & Elec. Co. v. Whitner*, 173 Va. 253 (1939); *Hubbard v. Murray*, 173 Va. 448, 452 (1939), *dictum*; *Temple v. Moses*, 175 Va. 320 (1940); *Huffman v. Jackson*, 175 Va. 564 (1940); *Smith v. Turner*, 178 Va. 172 (1941); *Isenhour v. McGranighan*, 178 Va. 365 (1941); *Noland v. Fowler*, 179 Va. 19 (1942); *Sanders v. Newsom*, 179 Va. 582 (1942); *Virginia Elec. & Power Co. v. Clark*, 179 Va. 596 (1942); *Luck v. Rice*, 182 Va. 373 (1944); *Harris Motor Lines v. Green*, 184 Va. 984 (1946); *Schools v. Walker*, 187 Va. 619 (1948); *Crouse v. Pugh*, 188 Va. 156 (1948); *Savage Truck Line v. Traylor*, 193 Va. 579 (1952); *Manhattan for Hire Car Corp. v. O'Connell*, 194 Va. 398 (1952); *Virginia Transit Co. v. Tidd*, 194 Va. 418 (1952); *Birtcherd Dairy, Inc. v. Edwards*, 197 Va. 830 (1956).

On the other hand, the following cases very definitely hold that the statutory standards of the Motor Vehicle Code are not conclusive, and conduct falling short of that specified in the statutes does not constitute negligence per se: *Morris v. Dame*, 161 Va. 545 (1933); *Howe v. Jones*, 162 Va. 442 (1934);

*Wright v. Viar*, 162 Va. 510 (1934); *Thomas v. Snow*, 162 Va. 654 (1934); *Gale v. Wilber*, 163 Va. 211 (1934); *Virginia Elec. & Power Co. v. Holland*, 184 Va. 893 (1946); *Clark v. Hodges*, 185 Va. 431 (1946); *Smith v. Clark*, 187 Va. 181 (1948); *Doss v. Rader*, 187 Va. 231 (1948); *Hamilton v. Glemming*, 187 Va. 309 (1948); *Powell v. Virginian Ry. Co.*, 187 Va. 384 (1948); *Hinton v. Gallagher*, 190 Va. 421 (1950); *Asphalt Service Co. v. Thomas*, 198 Va. 490 (1956); *Lavenstein v. Maile*, 146 Va. 789, 799 (1926), where the court said: "We do not wish to be understood as saying that there could be no case in which an automobile driver would not be guilty of negligence in driving to the left of the road when meeting another car, even in violation of the law of the road."

In the majority of cases involving this problem the opinions are too indefinite to permit their classification either as for or against the rule that the violation of the Motor Vehicle Code is negligence per se. They disclose an obvious unwillingness to accept the criminal law standards established by the Motor Vehicle Code as final and conclusive in all cases. This is demonstrated by a rather frequent resort to a strained application of a so-called rule of "proximate cause" to relieve the defendant of liability for having violated a statute. Thus, in *Clay v. Bishop*, 182 Va. 746, 751 (1944), the plaintiff was walking on the right side of the highway leading a horse when he was struck by a truck proceeding in the same direction on its right side of the road. In considering the plaintiff's negligence the court said: "Even if it be assumed that the statute does apply, and that its violation was negligence per se, yet it was for the jury to say whether such violation was a remote cause and the negligence of the driver was the proximate cause of the accident." Also, in *Dinges v. Hannah*, 185 Va. 744, 747 (1946), the defendant exceeded the emergency war-time speed limit of thirty-five miles an hour. The court held that the "evidence fails to show that [defendant] was guilty of . . . any negligence, which proximately caused the collision." Again, in *White v. Edwards Chevrolet Co.*, 186 Va. 669, 672 (1947), the operator of an automobile was driving after his permit

had expired when he ran over a small boy, aged 6, and killed him. In holding for the defendant, the court said:

Under familiar principles, [plaintiff] argues, the breaches of these statutes [including one requiring a driver's permit] were negligence per se.

[The plaintiff] then concludes that such negligence was a proximate cause of the boy's death. The trouble with this reasoning is that there is an entire lack of evidence of any causal connection between the statutory violations and the child's injury and death.

Likewise, in *Crouse v. Pugh*, 188 Va. 156, 167 (1948), the plaintiff was struck from behind and injured by defendant's car while he walked on the right side of the road in violation of the statute. The court said that the plaintiff's violation of the statute "amounts to negligence as a matter of law. Whether or not such a violation be a remote cause or the cause which proximately contributes to the injury is a question for the jury." It is obvious that in none of these four cases was there any problem of "proximate cause." While the final outcome of three of the four cases could be justified on other and more orthodox grounds, they illustrate that the court is employing "proximate cause" language to hold, in reality, that the violations were not negligence per se.

Another escape from the rigidity of the negligence per se rule has been, on occasion, a somewhat ingenious interpretation of the statute. For example, in *Morris v. Dame*, 161 Va. 545, 567 (1933), the court held: "Under a reasonable construction of a statutory provision such as [the criminal statute requiring a signal of a turn at a highway intersection], when no practical or reasonable degree of care and diligence for the safety of another would call for the performance of an act required thereby, no duty to do the act arises to [the plaintiff] as an individual." On the other hand, in *Schools v. Walker*, 187 Va. 619 (1948), it seems that the court unnecessarily interpreted several rules of the road to be intended for the protection of the plaintiff's house located 85 feet from the point on the highway where the violations took place. See also *Gough v. Shaner*, 197 Va. 572 (1955), where the court based liability on

a criminal ordinance which obviously had not been breached.

A study of all the cases involving the Motor Vehicle Code reveals that the court is conscious of common law fault or lack of fault apart from, or in addition to, violation of the statute. It is submitted that in each case holding the defendant liable for having violated the statute there was ample evidence of common law negligence. On the other hand, where it is apparent that there was no common law negligence, the court has found a way to neutralize the statute. This being true, why use the criminal statutes in tort cases at all?

In many cases the court has not imposed an absolute duty to comply with the statute. On the contrary, it has imposed only the duty to use reasonable care to meet the statutory standard. Thus, in these cases, the court is not holding the violation of the statute to be negligence per se. For example, see *Wright v. Viar*, 162 Va. 510, 514 (1934), where the court, in referring to the duties imposed by the Motor Vehicle Code, said: "In the performance of these duties he must exercise ordinary care." Again, in *Virginia Elec. & Power Co. v. Holland*, 184 Va. 893, 901 (1946), the court, in considering whether the traffic statute had been violated, said: "There would appear to be no other rule to guide the operator of an automobile under the conditions than the one of ordinary care." *Schools v. Walker*, 187 Va. 619, 624 (1948), holds that "reasonable care under the circumstances" is all that is required. To the same effect, see *Smith v. Clark*, 187 Va. 181 (1948). But see *Birtcherd Dairy v. Edwards*, 197 Va. 830, 834 (1956), which is expressly *contra*.

Most of the Virginia cases have not discussed the validity of the negligence per se doctrine. They rather assume its verity. The only two cases that give this problem more than passing consideration are *Morris v. Dame*, 161 Va. 545 (1933), and *Howe v. Jones*, 162 Va. 442 (1934). In the latter case, at page 447, the court, in upholding the refusal of the trial court to instruct the jury that breach of the motor vehicle statutes amounted to negligence, said:

This is a well-established rule and finds ample support

in many of our decisions . . . But like all general rules it is incapable of universal and literal application. In the instant case undoubtedly the defendant was on the wrong side of the road and the accident would not have occurred had he not been there. The violation of statutes, however, may be due to supervenient causes . . . Something more than the violation of the letter of the statute is at times necessary.

See also *Russell v. Kelly*, 180 Va. 304 (1942), and *Birtcherds Dairy v. Randall*, 180 Va. 311 (1942).

While the negligence per se doctrine is stated, and taken for granted, in most cases, in other cases the court has not failed to recognize the unsuitability of criminal statutes in tort cases. Thus, it has been repeatedly held that the "reckless driving" statute has no applicability in tort cases: *Morris v. Dame*, 161 Va. 545 (1933); *Gale v. Wilber*, 163 Va. 211 (1934). Yet, in *Via v. Badanes*, 189 Va. 44 (1949), the violation of the same statute was held to be negligence per se. Another view was taken in *Noland v. Fowler*, 179 Va. 19 (1942), where the court thought that the violation of the "reckless driving" statute was negligence per se as applied to a driver who was familiar with the danger ahead but not as applied to a driver who was unfamiliar with the road. Finally, in *Davis v. Webb*, 189 Va. 80 (1949), the whole matter was left to the jury to decide.

Why should not these tort cases be tried without any reference to criminal statutes? It is submitted that they should be, and some of the reasons for this view are briefly set forth, but not developed, below:

1. In framing the statute the legislature not only did not intend to set a standard for civil conduct but was endeavoring to formulate a standard for a wholly different purpose, *viz.*, to govern criminal conduct.

2. The immediate purpose of criminal law is to punish the offender, whereas the primary purpose of tort law is to compensate a deserving plaintiff. It may be doubted that a rule formulated for the one purpose is always well suited for the other purpose.

3. The negligence per se theory, in effect, requires the offender to be convicted of a crime before he can be held to be negligent. Furthermore, he is tried for the violation of a criminal statute by a civil court under whose procedural rules he may be found guilty of the violation on less evidence than is necessary in a criminal trial. The Virginia court has frequently referred to the finding of violation in the civil case as a "conviction." *Clark v. Hodges*, 185 Va. 431, 436 (1946); *Murray v. Smithson*, 187 Va. 759, 763 (1948).

4. Courts should not be encouraged to search for ready-made standards, but should be encouraged to create and construct their own standards. If this is done the judges will spend more thought in this task than if there are available ready-made standards of potential suitability. Since he has spent more thought in its creation, it naturally follows that the judge should have a better understanding of the standard. It has been suggested that the doctrine of negligence per se grew up because of the judiciary's respect for legislation. A more realistic reason, perhaps, is the failure of some judges to think out problems for themselves, or a lack of appreciation by many judges of the progress of tort law since the time of undifferentiation of criminal and tort liability in primitive law.

5. A conscious devotion to the negligence per se rule leads the court to prostitute the rightful office of "proximate cause" in too many cases in order to reach a final result which it considers just. The concept of cause being, perhaps, the most difficult to understand and apply in tort cases, it seems unfortunate that so many of the negligence per se cases are forced into the use of this concept when a refusal to employ the statute would leave the case to turn on the relatively simple question of common law negligence.

6. Frequently the criminal statute, as written, requires amendment by the court to make it suitable for use in the tort case. The amendment may be an addition to the statute, as in the cases holding that reasonable care to comply is sufficient, or it may result in throwing out a part of the statute, as in the

cases where "reckless driving" is held not applicable in tort cases.

Assuming it to be desirable, may a Virginia court refuse to employ the criminal statutes of the Motor Vehicle Code in the trial of tort cases? It has been done. It is submitted that it may properly be done, and should be done, if it is possible under Virginia law. There is no compelling common law rule against it; however, consideration has to be given to two infrequently used Virginia statutes which seem to compel the use of the negligence per se doctrine. Neither of the statutes is a part of the Motor Vehicle Code.

Va. Code Ann. §8-646.3 (1950) is entitled "Civil liability for damages resulting from criminal violations" and provides as follows:

In addition to the punishment prescribed for violation of any section of chapters 1 to 4 of Title 46, any person violating any of such provisions shall be liable for such damages as any other person may suffer as a result of such violations.

The chapters referred to are the first four chapters of the Motor Vehicle Code, including the Rules of the Road. The negligence per se doctrine was created and has developed to its present state in Virginia entirely independent of section 8-646.3. The statute was never cited until the recent case of *Kidd v. Little*, 194 Va. 692, 695 (1953), and it has not been cited since then. In spite of this statute having been originally, and until 1950, a part of the impounding statute, the conclusion that it has codified the negligence per se rule seems inescapable. Apparently the existence of this statute is generally known neither to the judiciary nor to the bar of Virginia. There is one rather strange inconsistency involving chapter 3 of the Motor Vehicle Code. By section 8-646.3, the violation of any of the statutes in this chapter by a defendant is negligence per se, yet section 46-67 provides that such violation by a plaintiff shall not be negligence. Furthermore, there may be some question as to the applicability of section 8-646.3 to the plaintiff

The other pertinent statute is a general one of much older vintage. Section 8-652 is entitled "Damages from violation of a statute, remedy therefor and the penalty," and provides as follows:

Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, even though a penalty or forfeiture for such violation be thereby imposed, unless such penalty or forfeiture be expressly mentioned to be in lieu of such damages. . . .

It would seem rather clear that this statute was intended to create civil liability for injury or damage resulting from conduct in violation of any criminal statute, including the Motor Vehicle Code. A similar Kentucky statute (KRS 446:070) has been consistently so construed. It is submitted that the Virginia statute should be similarly construed. Indeed, it has been given this meaning by the Virginia court: *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 179 (1883); *Richmond & Danville R. R. Co. v. Noell*, 86 Va. 19, 23 (1889) (held for defendant; no proximate cause); *Miller Mfg. Co. v. Loving*, 125 Va. 255, 259 (1919); *Standard Red Cedar Chest Co. v. Monroe*, 125 Va. 442, 444 (1919); *Wyatt v. C. and P. Tel. Co.*, 158 Va. 470, 477 (1932) (held for defendant; no proximate cause); *Oliver v. Cashin*, 192 Va. 540, 547 (1951), *semble*. Indeed, there is no case holding to the contrary.

Section 8-652 has fallen into almost complete disuse due, perhaps, to an unfortunate dictum made in an early federal case. In *Tyler v. Western Union Tel. Co.*, 54 Fed. 634, 637 (4th Cir. 1893), the court said:

It is very evident that the purpose of section [8-652] was merely to preserve to an injured person the right to maintain his action for the injury he may have received by reason of the wrongdoing of another, and to prevent the wrongdoer from setting up the defense that he had paid the penalty of his wrongdoing under a penal statute. It cannot be supposed that in enacting section [8-652] the legislature had the remotest idea of creating any new ground for bringing an action for damages."

Although the language is not precise, its meaning is clear when the facts, with reference to which this statement was made, are kept in mind. The plaintiff was seeking to recover for mental suffering unaccompanied by any physical injury. The law does not protect this interest against negligent conduct, *i.e.*, this is not one of the rights of the plaintiff protected by law. It is obvious that the court meant that the statute did not create any new rights in the plaintiff. This is entirely consistent with the Virginia cases cited above, all of which involved well-recognized rights of the plaintiff to which the law had given protection from time immemorial. Two state cases involved similar situations and therefore properly repeated the language of the federal case: *Connelly v. Western Union Tel. Co.*, 100 Va. 51 (1902) (mental anguish unaccompanied by physical injury) and *Hortenstein v. Virginia-Carolina Ry. Co.*, 102 Va. 914 (1904) (action for death resulting from violation of Sunday statute; safety of others not within purpose of statute).

To summarize the Virginia law, it may be said that the cases are conflicting as to whether the violation of the Motor Vehicle Code is negligence per se, but it would seem that sections 8-646.3 and 8-652 compel the holding that the violation of a criminal statute, including the provisions of the Motor Vehicle Code, is conclusive of negligence. If so, do these statutes apply to the plaintiff's conduct as well?