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Most likely it will not be accepted in cases where defendant is indicted for a felony because *Commonwealth v. Buck*¹⁶ is not authority and dictum in *Commonwealth v. Shrope*¹⁷ decides it is improper.

It seems it is allowable where defendant is charged with a misdemeanor, although the punishment may be fine or imprisonment or both.¹⁸

Surely it may be pleaded in Pennsylvania where the defendant is charged with a light misdemeanor punishable only by a fine.¹⁹

A defendant may not plead *nolo contendere* to an indictment for statutory rape.²⁰ Is the conclusion of the court correct? It is based only on the dictum contained in the *Shrope* case. Why should any distinction be made as to the propriety of this plea where the indictment charges a felony and where it charges a misdemeanor? The criterion seems to be the magnitude or severity of the punishment, not the degree of the crime. Since it is true that convictions for misdemeanors sometimes carry with them greater punishments than convictions for felonies, it ought to follow as a matter of logic, that this plea is proper regardless of whether the indictment charges a felony or a misdemeanor so long as the punishment is not capital, since the plea has been permitted where the punishment imposed was imprisonment.²¹

Herbert Horn.

VIOLATION OF A STATUTE OR ORDINANCE AS EVIDENCE OF NEGLIGENCE

Today, more and more, we find that legislatures are enacting statutes defining duties which at common law

¹⁶107 Pa. (1884).

¹⁷264 Pa. 246 (1919).

¹⁸*Commonwealth v. Holstine*, 132 Pa. 357 (1890).

¹⁹*Commonwealth v. Shrope*, 264 Pa. 246 (1919); *Tucker v. U. S.*, 41 L. R. A. (N.S.) 70.

²⁰*Commonwealth v. McGowan*, 12 D. & C. 286.

²¹*Commonwealth v. Holstine*, 132 Pa. 357 (1890).

were not so defined but left to be determined under the general rules of negligence. An attempt is made herein to examine representative cases to determine the effect which the courts are giving these statutes.

There are, in general, two ways of construing the violation of statutes in negligence cases. The first and strictest rule is that of negligence per se. The other is construing the violation of the statute as mere evidence of, or some evidence of negligence.

Negligence Per Se

Before starting to examine the cases, it would be well to have some common ground of understanding on the question as to just what is negligence per se. Like most of our abstract doctrines at law, we cannot hope to make one which will fit every situation. 20 RCL sec. 33 defines negligence per se in this manner:

"The principle comprehensively stated is that where a statute or a municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent and which were proximately produced by such neglect."

Also in *Platt v. The Southern Photo Material Co.*¹

"So long as duties remain undefined, or defined only in abstract terms, a breach is not properly defined as negligence per se; but when any special act or dereliction is wrong universally so as to be subject to the attention of legislative power and it is expressly prohibited by law, any violation, a doing of this forbidden specific act is correctly called negligence per se."

Negligence per se is a matter of law. There is no question of fact and as such it is subject to judicial rather than jury determination. That is, of course, where there is a proved violation. Ordinary negligence has two com-

¹4 Georgia 159; 60 S.E. 1068.

ponent parts: a duty and a violation. In negligence per se, so called, the duty as such is by preceding thought and enactment laid down definitely and concretely. It seems then that it is the duty which is per se. Consider a statute making it unlawful to operate a motor vehicle over thirty-five miles per hour in a given territory. Concede a violation of this statute as a result of which an injury is caused and we say it is negligence per se. It is not the negligence which the legislature had laid down, it is the duty. Per se then is more properly attached to duty.

Penal Statutes Exclusive

In *Westervelt v. Dives*² the court held that when a statute creates a new duty and provides for a fine, the presumption is that such money payment is exclusive but if a plain duty is imposed for the benefit of an individual, and the penalty is obviously inadequate to compel performance, the implication will be strong, if not conclusive, that the penalty was meant to be cumulative to such remedy as the law gives when a duty owing to an individual is neglected. A penal statute in Pennsylvania has been held exclusive of any other remedy than that provided. The Act of May 11, 1893, P.L. 41 requires building contractors to cover the joists or girders of each floor above the third story with board or other suitable material so as to protect workmen and others. The case of *Mack v. Wright*³ held that:

“The money penalty provided by the act is exclusive of all other remedies and an action for damages for personal injuries cannot be sustained for failure to comply with the general provisions of the act.”

In the *Westervelt* case the Act of May 30, 1895, P.L. 129 prescribed that automatic locking devices on elevators must be attached. The court in construing the act held it was not exclusive in its penalty but that a person injured by reason of the neglect of the duty so imposed could maintain

²231 Pa. 548.

³180 Pa. 472.

a civil action for damages. In *McElhone v. Phila. Quartette Club*,⁴ the court said:

"The fact that the act of May 2, 1905, P.L. 352 is penal in character and that violations of its provisions are punishable by fine or imprisonment does not render such remedies exclusive and does not supersede the right of action for damages in a civil proceeding."

That the *Mack* case is in conflict with the latter three cases is obvious and recognized as such by our Supreme Court. Although not dealing with the question, the Supreme Court admits in *Commonwealth v. Wilkins*:⁵

"It is not necessary to consider under what circumstances a private party may maintain an action to recover damages for injuries resulting from a breach by the defendant of a statutory duty, when the act prescribing it provides for a penalty for its violation, but does not expressly declare the party injured may sue because thereof. Perhaps our cases on this point are not wholly reconcilable, at least if full weight is to be given to the dicta therein."⁶

The conclusion seems to be that in all cases we must first look at the words of the statute itself to determine whether or not the statutory penalty is to be held to be exclusive. It is suggested that the *Mack* case was decided many years before the latter cases holding contra and the same result would not be reached today. Apparently from reading the statute itself, there can be no accounting for the difference in the result attained as the statute certainly would be applicable in a civil suit if the general *purpose doctrine* were the test. It was for the protection of workmen and others.

⁴53 Pa. Super. Ct. 262.

⁵271 Pa. 528.

⁶Citing *Mack v. Wright*, 180 Pa. 472; *Stehle v. Jaeger Mach. Co.*, 220 Pa. 617; *Westervelt v. Dives*, 231 Pa. 548; *Bryuelson v. Turner-Forman Concrete Steel Co.*, 239 Pa. 346; *Danner v. Wells*, 248 Pa. 105. See also *Christner v. Coal Co.*, 146 Pa. 67

Cases and Statutes

1. Statutes on Negligence

Under some Pennsylvania statutes the violation is made negligence per se and as such there is no room for construction. The act of 1891, P.L. 176, Article XI, section 3 reads as follows:

"A failure to comply with the provisions of this article shall be deemed an offense against this act, and shall be taken to be negligence per se on the part of the owner, operator, superintendent or mine foreman, as the case may be, * * * *"

The same might be said as to the provision in the Motor Vehicle Code when the owner permits an infant under the age of 16 years to drive his machine.

2. Selling Firearms

In the cases under the act of June 10, 1881, P.L. 111 imposing on fire-arm merchants a duty not to sell to a minor under 16 years it has been held that a violation would subject such a merchant to liability "for any natural or probable harmful result which might follow in the wake of his wrongful act."⁸ Going further, they have held that an ordinary discharge is the natural and probable consequence.⁹ Thus, taken together, the holdings can only represent negligence per se. In *Wassel v. Ludwig*¹⁰ the minor's negligence was held immaterial. That case expressed approval of the two preceding cases. However, the facts disclose that the injury was not caused by the minor who purchased, but by the discharge by one of his playmates. The question of negligence could not be stated as negligence per se and the non-suit was taken off to submit the question to the jury. In these cases, (notes 8 and 9) the existence of negligence as a foundation was not questioned and they probably represent true holding of

⁷Collins v. Northern Anthracite Coal Co., 241 Pa. 55; Kolalsky v. Dela. & H. R. Co., 260 Pa 357.

⁸Shaffer v. Mowry, 265 Pa. 300.

⁹McMullin v. Stehle, 275 Pa. 584.

¹⁰92 Pa. Super. Ct. 341.

negligence per se. Whether there was a violation of the statute of course, can be questioned.¹¹

3. Child Labor Cases

Section 1 of the Act of April 29, 1909, P.L. 283 prohibits the employment of any minor under the age of 18 years in any factory except under certain conditions specified in the act. Section 7 of the same act forbids employment of minors under 16 unless there is a record on file, accessible to the factory deputy inspector, an employment certificate and unless the employer also keeps two lists of all minors under 16, one on file in the office and one conspicuously posted in each of several departments where the minors work. This language was held to be mandatory in *Chobot v. Pitts. P. Glass Co.*¹² and failure to comply is negligence for which the defendant is liable. It further states: "Law refers the injury sustained by the employee to the original wrong as its proximate cause." The provision was mandatory and as such prerequisite to any legal employment. The employer had failed to post the list and to permit recovery seems a bit harsh since from the facts the posting violation was not the proximate cause of his injury. The authorities are collected in *Johnson v. Endura Mfg. Co.*¹³ That case was decided under the Child Labor Act of 1915, P. L. 286. There the court said:

"It is true that if the original employment of the minor is expressly prohibited and as a result of such employment his presence upon the premises where the accident occurred is thus occasioned, the owner will be responsible, for the illegal hiring will be deemed the proximate cause. This has been held under statutes similar to the one now under construction, where the plaintiff was under the lawful age of 14 years."¹⁴

The same result can be found as to an illegal employ-

¹¹Pierson v. London, 156 Atl. 719 at 721.

¹²259 Pa. 504.

¹³282 Pa. 322.

¹⁴Citing *Krutlies v. Bulls Head Coal Co.*, 249 Pa. 162; *Faibla v. Calderone*, 275 Pa. 303; *Stehle v. Jaeger Mach. Co.*, 225 Pa. 348.

ment under the Mine Act of June 15, 1911, P.L. 983. It was held in *Telinko v. Pitt. Coal Co.*,¹⁵ that:

“As we view the legislation, its purpose was to make unlawful the hiring of one within the prohibited age, where the main purpose was to perform some extra hazardous work as therein defined but to permit it in other cases.”

In *Riley v. Pittston Coal Co.*,¹⁶ where the employment was lawful under Sec. 8, Article V of the Act of June 21, 1891, P.L. 176 the result was different as no statutory duty was applicable. In *Lenahan v. Pittston Coal Co.*,¹⁷ it was held that contributory negligence or assumption of risk was no defense when the action is founded on the violation of a statute by employing a minor in a hazardous employment.

In view of the holding in these cases there seems to be no justification for the decision of *Belles v. Jackson*¹⁸ where it was held that though the employment was unlawful still it must be the proximate cause of the injury. Ermentrout, P. J. said:

“The illegal employment, therefore, does not per se constitute negligence. Such employment must be the direct or proximate cause of the injury complained of, and this must be determined in accordance with the general rule.”

Here the employment was of a minor of 12 years of age in violation of the Act of May 20, 1889, P.L. 243. The case has never been cited and seems to have been impliedly overruled.

A rapid reading of *Stehle v. Jaeger Mach. Co.*,¹⁹ would leave the same impression as *Belles v. Jackson* but the case was really at issue on the question of violation of a labor act. The fact submitted to the jury was not whether the employment was the cause of the injury but whether the employment was prohibited by law.

¹⁵68 Pa. Super Ct. 143

¹⁶224 Pa. 633.

¹⁷218 Pa. 311.

¹⁸4 Dist. Ct. 194.

¹⁹225 Pa. 348.

4. Safety Regulations Generally

Under statutes defining duties as to the condition of premises, such as to guard a shaft, the violation is treated as negligence per se although our Pennsylvania courts seem to be adverse to the use of that term. In *Drake v. Fenton*²⁰ it was held that a failure to guard a shaft is a neglect of a statutory duty against which nothing but contributory negligence will relieve. A case often cited on the question of negligence arising from the violation of a statutory duty is *Beach v. Hyman*.²¹ The plaintiff relied on the Act of 1903, P.L. 304 to show liability:

“ . . . Such guards on enclosure gates shall be kept closed at all times when not in actual use and trap doors shall be closed at the close of business each day, by the occupant or occupants of the building having the use or control of the same.”

The case was decided, however, on the ground that the defendant had not violated the act, and if so, that the injury was not the proximate cause of the violation. The case therefore establishes nothing as to the existence of a duty created by statute. The employer had supplied the guards but a workman had evidently allowed them to remain open. The defendant was not liable since the open guard was a mere transitory danger. The defendant was not required to follow and observe the details of each man's work. However, it was said that the binding authority of *Drake v. Fenton*²² is not to be questioned but it is not to be overlooked that it is conditioned not only on the negligence of the occupant of the building but on neglect which was the proximate cause of the accident.²³ Probably the strongest language is found in *Bollinger v. Crystal Sand Co.*,²⁴ decided under the Act of May 2, 1905, section 11, P.L. 352,

²⁰237 Pa. 8; 32 Ann. Cas. 1914 B 517.

²¹254 Pa. 131.

²²237 Pa. 8; 32 Ann. Cas. 1914 B 517.

²³Citing *Jones v. Amer. Caramel Co.*, 225 Pa. 644; *Valjago v. Carnegie Steel Co.*, 226 Pa. 514; *Bollinger v. Crystal Sand Co.*, 232 Pa. 636.

²⁴232 Pa. 636.

where it is said that a statute is a legislative mandate and disregard is negligence rendering everyone guilty of it responsible for the consequences resulting directly and solely from it. Under *Drake v. Fenton*²⁵ construing an act on elevator guards it was said that the act was passed under the police power for the benefit of all persons lawfully on the premises and as to them it created a duty the breach of which was actionable negligence.

In *Jaras v. Wright*²⁶ the court decided that there was no legal excuse for a failure to obey an absolute statutory requirement. The statute was the Act of June 9, 1911, P. L. 798 regulating "electric haulage by locomotives operated from a trolley wire . . . in any gaseous portions of mines except upon intake air, fresh from the outside."

The lower courts followed the Supreme Court in *Fry v. Brubaker*²⁷ under the Act of March 25, 1903 P.L. 54.²⁸

5. Traffic Regulations

Under statutes concerning road law the courts apply the same rule of negligence per se for a violation when the duty is definitely fixed within absolute limits.²⁹ The language used is much the same as has been quoted in the above section. The violation of the statutory duty is negligence per se but it must be the proximate cause.

In all the cases except those under the selling of fire arms' statutes and those under statutes dealing with

²⁵237 Pa. 8; 32 Ann. Cas. 1914 B 517.

²⁶263 Pa. 486.

²⁷77 Pa. Super. Ct. 438.

²⁸Citing *Drake v. Fenton*, 237 Pa. 8, and *Beach v. Hyman*, 254 Pa. 131. Also see *Neagley v. Cassone*, 10 D. & C. 632 construing different acts.

²⁹*Lane v. E. A. Mullen, Inc.*, 285 Pa. 161 and *Community Fire Co., v. Pa. Power and Light*, 92 Pa. Super. Ct. 304. But it must be the efficient cause—failure to comply with license law did not bar recovery as contributory negligence—*Yeager v. Winton Motor Car Co.*, 53 Pa. Super. Ct. 202; *McIlhenny v. Baker*, 63 Pa. Super. Ct. 385; *Preston v. Pilch*, 2 D. & C. 180. See also *Clamper v. Phila.* 279 Pa. 385. As to negligence per se attaching to a definite duty, see *Zanduras v. Moffet*, 286 Pa. 477; *Hayes v. Schomaker*, 302 Pa. 72 at 77; *Piper v. Adams Express Co.*, 27 Pa. 54; which is the meaning of the dictum in *Johnson v. Amer. Reduction Co.*, 158 Atl. 153.

child employment in dangerous occupations, the violation must be proven to be the proximate cause of the injury. In the excepted examples not only was the negligence per se but the result was per se proximately caused by the violation. Contributory negligence will bar a recovery even when the defendant has violated a statute, but the exception noted in the fire-arm and employment statutes is true here also.

In no case is the doctrine of assumption of risk available as a defense.⁸⁰

Ordinances

Under ordinances the courts have applied a different rule and even though the duty is well defined the violation is treated as mere evidence of, or some evidence of negligence, to be considered with the other facts to ascertain whether or not the defendant is guilty of negligence.⁸¹ As was said in *Uhelman v. American Ice Co.*,⁸²

“Ordinances and their violation are admissible not as substantive and sufficient proof of negligence of the defendant, but as evidence of municipal expression of opinion, on the matter as to which the municipal authorities have acted.”

⁸⁰Riley v. Pittston Coal Co., 224 Pa. 633; Amiano v. Jones & Laughlin Co., 233 Pa. 524; Jones v. American Caramel Co., 225 Pa. 644; Valjago v. Carnegie Steel Co., 226 Pa. 514; Smith v. Stoner, 243 Pa. 57; Dobra v. Lehigh Valley Coal Co., 250 Pa. 313.

⁸¹Uhelman v. American Ice Co., 209 Pa. 398; Lederman v. P. R. T. Co., 165 Pa. 118; Foote v. Amer. Products Co., 195 Pa. 190; Weinschenck v. Phila. Homemade Bread Co., 258 Pa. 99; Fane v. P. R. T. Co., 228 Pa. 471; Pa. R. R. Co., v. James, 81 1/2 Pa. 194; Connor v. Elect. Traction Co., 173 Pa. 602; Shaeffer v. Roesch, 215 Pa. 287; Ed. Davidson v. Schuylkill, 4 Pa. Super. Ct. 86; Bill v. Jacobs, 261 Pa. 204; Murphy v. P. R. T. Co., 285 Pa. 399; Hibberd v. Phila., 245 Pa. 265; Herron v. Pittsburgh, 204 Pa. 509; Rigert v. Thackery, 212 Pa. 86; Reading R. R. Co. v. Ervin, 89 Pa. 71; Pitts. v. Grier, 22 Pa. 65; Bayle v. P. R. T. Co., 286 Pa. 536; Lyles v. P. R. T. Co., 93 Pa. Super Ct. 290; Gannon v. Wilson, 18 W. N. C. 7.

⁸²209 Pa. 398.

And in *McNerney v. Reading*³³ the reason given was:

"It was an act of the municipality and in effect a declaration by it that the public safety required that openings in pavements should be properly guarded."³⁴

Here too, the violation of the ordinance must be the proximate cause of the injury.³⁵

Conclusion

Statutes

1. Under the statutes prohibiting the selling of fire-arms to minors and statutes prohibiting the employment of infants in a dangerous occupation, the violation of the statutory duty is negligence per se. Further, the violation is treated as the proximate cause of the injury. Contributory negligence or assumption of risk will not bar recovery.
2. Statutes creating definite duties as to traffic regulations or general safety regulations in mining, manufacturing, or buildings are mandatory and the violation is negligence per se but the proximate cause must be established before the violation will be actionable. Contributory negligence will bar recovery but assumption of risk will not.

Ordinances

1. The mere violation of an ordinance is some evidence of negligence to be treated with the other evidence. The violation must be the proximate cause and, a fortiori, contributory negligence will bar recovery.

Howard M. Kuehner.

INTEREST OF BOROUGH COUNCILMEN IN BOROUGH CONTRACTS

The recent Act of June 9, 1931, P.L. 386, sec. 13, re-emphasizes the problem of a borough councilman's inter-

³³150 Pa. 611.

³⁴See also *Bunis v. Pa. R. R. Co.*, 210 Pa. 94.

³⁵215 Pa. 287