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Negligence Per Se Defined in Florida

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NEGLIGENCE PER SE DEFINED IN FLORIDA

Petitioner, Pedro Nieves deJesus, and his wife were driving down a road on a dark night when the car he was operating struck an unlit tankcar belonging to respondent railway company. The black tankcar was blocking the road while the train's engine was several hundred feet down the track. DeJesus and his wife brought this negligence action against the railroad. The railroad based its defense on contributory negligence. The jury found for the plaintiff upon the charge that if the statute in question had been violated, negligence would result as a direct consequence of the violation. On appeal, the District Court of Appeal, Second District, held that the charge was erroneous and consequently reversed and remanded.[1] The court certified a question to the Supreme Court of Florida requesting a ruling to determine which type of statute, when violated, would result in negligence per se.[2]

The Supreme Court of Florida, on conflict certorari review *held*, reversed: violation of a statute imposing upon a railroad a duty to protect occupants of automobiles from colliding with unlighted trains blocking highways at night at unlighted crossings was negligence per se. *deJesus v. Seaboard Coast Line R.R.*, 281 So. 2d 198 (Fla. 1973).

The three basic elements of negligence per se are (1) violation of a statute creating a duty to protect a certain class of people; (2) damage caused by said violation; and (3) the damage so caused must be to a member of the protected class. Once there is a violation meeting these criteria the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence and the jury must be so directed.[3]

Florida decisions concerning negligence per se have in the past followed three distinct lines of reasoning. Each decision is based on the particular type of statute violated. *Tamiami Gun Shop v. Klein*[4] concerned a violation of a strict liability statute;[5] *Hoskins v. Jackson Grain Co.*[6] concerned violation of a statute which did not provide for strict liability, but which nevertheless set standards of care to protect a certain

1. Seaboard Coast Line R.R. v. deJesus, 266 So. 2d 108 (Fla. 2d Dist. 1972).

2. The district court presented the question in this manner: "Is the violation of a statute or ordinance, other than those specifically adopted for the purpose of establishing a stricter duty of care, negligence per se or evidence of negligence in a civil action?" The supreme court, after noting that the question could not be answered in the manner asked, replied that, "[v]iolations of statutes, other than those imposing a form of strict liability, may be *either* negligence per se *or* evidence of negligence." deJesus v. Seaboard Coast Line R.R., 281 So. 2d 198, 201 (1973). The supreme court also granted certiorari in view of the conflict between the district court and its decision in Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953).

3. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 200 (4th ed. 1971). For a good overview of negligence per se, see Note, *Ferrell v. Baxter: Negligence Per Se in Alaska*, 2 U.C.L.A.-ALASKA L. REV. 54 (1972).

4. 116 So. 2d 421 (Fla. 1959) [hereinafter referred to as *Tamiami*].

5. See note 12 *infra* and accompanying text.

6. 63 So. 2d 514 (Fla. 1953) [hereinafter referred to as *Hoskins*].

class of people; *Richardson v. Fountain*[7] and *Allen v. Hooper*[8] concerned violations of statutes protecting the public as a whole.

The defendant gun dealer in *Tamiami* violated a Florida state statute and a Miami city ordinance prohibiting sales of firearms to minors.[9] The plaintiff, father of the boy who bought the weapon, sued as a result of an accident which occurred when the gun accidentally discharged blowing off his son's thumb. The boy was clearly contributorily negligent and the defendant offered that defense. The Supreme Court of Florida upheld the district court's decision that violation of this particular type of statute constituted negligence per se and contributory negligence was no defense.[10] Addressing itself to the matter of violation of strict liability statutes, the court said:

> In considering this group of unusual and exceptional statutes, the courts usually find a legislative intent to remove the defense of contributory negligence. Such statutes have been construed to place the entire responsibility upon the defendant, and to require him to protect not only plaintiffs who are exercising reasonable care but those who are contributorily negligent as well.[11]

The decision relied upon the Restatement of Torts definition of a strict liability statute, that is, one which is to protect a certain class of persons from their inability to protect themselves.[12] It was noted that this class was also protected by child labor acts.[13]

Violation of a penal statute that did not set strict liability but which was intended to protect a certain class of people was the subject of *Hoskins*.[14] There, a seed dealer sold plaintiff a mismarked batch of seeds, resulting in the loss of his crop because the type of seed received did not grow well in the type of soil on plaintiff's farm. He sued the wholesaler on the theory of breach of an implied warranty. On appeal, the Supreme Court of Florida decided the case on the theory of negligence per se, finding the wholesaler guilty of violating a penal statute

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7. 154 So. 2d 709 (Fla. 2d Dist. 1963) [hereinafter referred as *Richardson*].

8. 126 Fla. 458, 171 So. 513 (1937) [hereinafter referred to as *Allen*].

9. FLA. STAT. § 790.18 (1971); MIAMI, FLA., CODE OF LAWS § 61-1(d) (1967).

10. For a case in which the District Court of Appeal, First District, found no negligence per se on similar facts, see Williams v. Youngblood, 152 So. 2d 530 (Fla. 1st Dist. 1963), in which a child sued the father of a playmate who shot him with a B.B. gun. The child was held not to be a member of the class protected by a statute prohibiting the use of B.B. guns by children without proper supervision.

11. Tamiami Gun Shop v. Klein, 116 So. 2d 421, 423 (Fla. 1959).

12. *Id.*; *see* RESTATEMENT (SECOND) OF TORTS § 483 (1965).

13. *See* Tampa Shipbuilding and Eng'r. Corp. v. Adams, 132 Fla. 419, 181 So. 403 (1938); Baldridge v. Hatcher, 266 So. 2d 112 (Fla. 2d Dist. 1972), wherein the size of the plaintiff's son was offered as a defense to a violation of a child labor statute. The court said, "[t]his must raise precisely the point the legislature had in mind in protecting minors from certain inherently dangerous conduct. If size were the measure of maturity of judgment, King Kong could be President." *Id.* at 113.

14. 63 So. 2d 514 (Fla. 1953).

which regulated the marking of seed. The court set out the general negligence per se rule for Florida:

> Where one violates a penal statute imposing upon him a duty designed to protect another he is negligent as a matter of law, therefore responsible for such damage as is proximately caused by his negligence.[15]

This rule was applied to the facts in *deJesus* and determined the outcome.

The third type of statute protects the public as a whole. This category includes traffic laws, municipal ordinances, and regulations of administrative bodies. Florida, as well as many other states, does not apply the negligence per se rule to these laws.[16] Violations of these laws are either considered to be prima facie evidence of negligence, which may be overcome, or the law may be read in a manner such that it does not provide protection to a certain class of people. *Allen*[17] dealt with the traffic law aspects of this problem. The Supreme Court of Florida stated that the Florida view concerning traffic violations is that these violations are prima facie evidence of negligence. This prima facie evidence can be overcome by proof of surrounding circumstances and conditions which will eliminate the claim of negligence. The final determination of negligence is to be made by the jury.[18] In *Richardson*,[19] the law violated was a city penal ordinance which provided for the height of awnings. The plaintiff struck his head on a low awning which violated this ordinance and sued on the basis of negligence per se. The defendant store offered the defense of contributory negligence. On appeal, the Court of Appeals, Second District, held that negligence per se did not apply since "the ordinance in question is not designed to protect a particular class of persons within the meaning of the case law . . . ."[20] In the course of its decision the court made the statement that "this jurisdiction follows the weight of authority in holding that except as to penal ordinances and statutes other than those involving traffic, such is negligence per se."[21] This confusing statement was part of the reason that the Supreme Court of Florida outlined the rules for negligence per se in *deJesus*.

The following rules laid out in *deJesus* are clear cut. If a statute providing for strict liability is violated, then there is negligence per se and contributory negligence is no defense.[22] If a statute establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury, a violation is negligence per se. How-

15. *Id.* at 515.
16. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 201 (4th ed. 1971).
17. 126 Fla. 458, 171 So. 513 (1937).
18. *Id.* at 463, 171 So. at 516.
19. 154 So. 2d 709 (Fla. 2d Dist. 1963).
20. *Id.* at 712.
21. *Id.* at 711.
22. *See* Tamiami Gun Shop v. Klein, 116 So. 2d 421 (Fla. 1959).

ever, contributory negligence can be a defense to the liability imposed.[23] Violation of any other type of statute is prima facie evidence of negligence. These statutes include traffic law statutes.[24]

Violations of any type of statute which would be considered negligence per se by the above rules must be proven to meet all the elements of negligence. The plaintiff must show that he is a member of the protected class, that he suffered injury of the type the statute was designed to prevent and that the violation was the proximate cause of his injury.

The court, applying the above rules to the instant case, held that the statute imposed a duty to protect automobile drivers and their passengers from running into unlit railroad trains, and that the defendant's violation constituted negligence per se.

The rules laid down in *deJesus* should help the lower courts interpret statutes to determine whether violations constitute negligence per se. The rules are clear cut and easy to apply. The first and third rules adopt the prior case law directly. The second rule, however, does not follow preexisting case law as closely. As noted in *Hoskins*, the violation of a statute setting standards of care to protect a class is negligence per se if all conditions are met. There is no mention of any viable defense. In the *deJesus* rule, contributory negligence becomes an allowable defense.[25] This is a more realistic, less mechanical view of the law which should lead to a realization that other defenses are appropriate. Other jurisdictions such as Oregon, have shown a willingness to modify and enlarge the defenses to negligence per se, although in a limited manner.[26] Perhaps Florida will follow these leaders and continue to liberalize these rules. Such a liberalization would give juries a greater latitude in determining negligence and the resulting liability.

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23. See Note 24 *infra*.

24. Negligence per se with the possibility of excuse provides a means of circumventing the legislatively predefined standard of conduct. A prima facie case for negligence adopts the legislative standard long enough to put the question before the jury, but then allows a rebuttal of both liability and the appropriateness of the standard itself—as a test of civil liability.

Note, *Statutory Negligence in Oregon*, 7 WILLAMETTE L.J. 469, 477 (1971).

25. In Tamiami Gun Shop v. Klein, 116 So. 2d 421 (Fla. 1959), the court implied that contributory negligence may be a defense to negligence per se when strict liability was not the standard, but made no ruling on this point. With the adoption of comparative negligence, *Hoffman v. Jones*, 280 So. 2d 431, (Fla. 1973), not mentioned in the noted case, this is no longer an absolute defense. Courts will probably apportion damages as if the case were an ordinary negligence case. The same result would apply with a violation of a traffic type statute. Comparative negligence would have no effect concerning violations of strict liability statutes since contributory negligence was never a defense in such cases.

26. *See Note, Statutory Negligence in Oregon*, 7 WILLAMETTE L.J. 469 (1971).