Kentucky Law Journal

Volume 62 | Issue 1 Article 11

1973

Negligence--Violation of Safety Regulation as Negligence per se: The Perishable Sanction

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NEGLIGENCE—VIOLATION OF SAFETY REGULATION AS NEGLIGENCE PER SE: THE PERISHABLE SANCTION

An inexperienced swimmer rents a boat which does not contain a life preserver as required by a boating-safety regulation. He rows to the middle of a lake and drowns when the boat overturns. In an action brought by the administrator of his estate, where does liability lie? We shall explore the law of negligence sufficiently far to examine the consequences, in a negligence action in Kentucky, of the violation by a defendant of an administrative regulation. The policy considerations surrounding and the current law controlling the effect on such negligent action by a plaintiff's contributory negligence will also be treated, and it will be seen how, under the rules of our law, the sanctions attached to the violation of a safety regulation are rendered nugatory.

Violation and Defenses

In Kentucky, the violation of a valid, properly promulgated[1] administrative regulation, like the violation of a statute or an ordinance, is, under four conditions, considered negligence per se.[2] The four conditions are that: 1) the regulation must have been promulgated for safety purposes; 2) the injury must be one the regulation was promulgated to prevent; 3) the injury must be to a member of the group protected; and 4) the violation must be the proximate cause of the injury.[3] The denomination of an act or omission as negligence per se attaches to it no greater significance than that attached to ordinary negligence.[4] Thus, to both are available the same defenses: contributory negligence, assumption of risk, and proximate cause.[5]

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[1] KY. REV. STAT. §§ 13.080-13.105 (1971) [hereinafter cited as KRS] provide for the promulgation of administrative regulations, prescribe the procedures through which they are validated, and establish the conditions under which they may be judicially noticed. *See* Akers, *The 1952 State Agency Law*, 41 KY. L.J. 13 (1952).

[2] Home Ins. Co. v. Hamilton, 253 F. Supp. 752 (E.D. Ky. 1966). *See* Comment, *Violation of an Administrative Regulation as Negligence Per Se*, 55 KY. L.J. 886 (1967).

[3] *See* Comment, *Violation of an Administrative Regulation as Negligence Per Se, supra* note 2, at 887.

[4] *See* Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 MINN. L. REV. 105, 111-12 (1948). Dean Prosser states that "negligence per se refers to the rule . . . that the declaration of a standard of conduct by the legislature removes it from any determination by the jury, and that if the statute is violated, negligence must be found without argument, as a matter of law. . . . In short, such 'negligence per se' is merely ordinary negligence. . . ."

[5] *Id.* at 111, wherein it is stated that:

"Negligence per se" is not liability per se, and even though the viola-

(Continued on next page)

The defense of assumption of risk has been abolished in Kentucky.[6] The Court of Appeals held, in *Parker v. Redden*,[7] that where an injury occurs as a result of plaintiff's action when encountering defendant's negligence, the relevant issue is not whether plaintiff assumed the risk, but whether plaintiff acted *reasonably*.[8] The inquiry, then, in all cases, is whether plaintiff was contributorily negligent.[9] Contributory negligence, like ordinary negligence, is the failure to exercise the degree of care a prudent person would exercise in the same or similar circumstances.[10] For the negligence of plaintiff to be contributory, it need not be the proximate cause of the accident complained of;[11] it is sufficient if it contributed in any way or in any degree directly to the injury.[12] A finding that plaintiff was contributorily negligent completely bars his recovery.[13] Although the question of contributory negligence is ordinarily one for the jury, when the proof is such that reasonable minds can draw but one conclusion, the question is one of law for the court to decide.[14]

Where a defendant's violation of a statute or regulation is deemed negligent per se, the defense of contributory negligence cannot be maintained if the statute or regulation was designed to protect a class of persons from their inability to exercise self-protective care[15] and to place the entire responsibility of any violation-related injury upon the defendant.[16] Examples of such enactments are child labor

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tion is "conclusive evidence" of negligence and a peremptory instruction must be given on that issue, there remain in the case all of the other issues, such as assumption of risk, contributory negligence, and proximate cause. . . .

[6] Parker v. Redden, 421 S.W.2d 586 (Ky. 1967).

[7] *Id.*

[8] *Id.* at 593.

[9] Though gallons of ink have been expended in efforts to distinguish assumption of risk from contributory negligence, it may be said simply that assumption of risk is based on a *subjective* standard, requiring knowledge of the danger on the part of the plaintiff, while contributory negligence is based on an *objective* standard, requiring of plaintiff that conduct demanded of a reasonable man. *See* Parker v. Redden, 421 S.W.2d 586, 592 (Ky. 1967). *See also* Comment, 23 WASH. & LEE L. REV. 91 (1966).

[10] Post v. American Clean. Equip. Corp., 437 S.W.2d 516, 520 (Ky. 1969).

[11] Acres v. Hall's Adm'r, 253 S.W.2d 373 (Ky. 1952); Louisville & N. Ry. v. Hyde, 239 S.W.2d 936 (Ky. 1951).

[12] 65A C.J.S. *Negligence* § 129 (1966).

[13] Archer v. Bourne, 300 S.W. 604 (Ky. 1927); Straight Creek Fuel Co. v. Mullins, 225 S.W. 726 (Ky. 1920).

[14] Goetz v. Green River Rural Elec. Co-op. Corp., 398 S.W.2d 712 (Ky. 1966); Winn-Dixie Louisville, Inc. v. Smith, 372 S.W.2d 789 (Ky. 1963); Peerless Mfg. Corp. v. Davenport, 136 S.W.2d 779 (Ky. 1940); Archer v. Bourne, 300 S.W. 604 (Ky. 1927); Straight Creek Fuel Co. v. Mullins, 225 S.W. 726 (Ky. 1920).

[15] 65A C.J.S. *Negligence* § 130 (1966); Skarpness v. Port of Seattle, 326 P.2d 747, 749 (Wash. 1958).

[16] W. PROSSER, LAW OF TORTS § 36 (4th ed. 1971) [hereinafter cited as PROSSER]; Skarpness v. Port of Seattle, 326 P.2d 747, 749 (Wash. 1958).

laws,[17] the Federal Employer's Liability Act,[18] and the Kentucky statute[19] abrogating a railroad employee's contributory negligence as a defense to an action for injury or death contributed to by the railroad's violation of a state or federal safety statute.[20] A statute or regulation may also be designed to relieve those who are fully capable of protecting themselves from the burden of doing so.[21] Such an interpretation is likely to be given a statute or regulation only where the intent of the legislative or administrative body involved is clear.[22]

Proximate Cause

A central issue to be resolved before a defendant may be held liable in negligence for violation of a regulation is whether the plaintiff's negligent conduct intervened in the production of the injury to the extent that it may be said that the defendant's violation of the regulation was not the proximate cause [23] of the plaintiff's injury.[24]

The Kentucky rule is that the proximate cause of an injury is that factor which, in continuous and natural sequence, and without the intervention of an independent responsible cause, induced the injury,[25] and without which the injury would not have occurred.[26] The question of what constitutes proximate cause is ordinarily for the jury to determine, but where the uncontradicted evidence is such that only one conclusion may be drawn therefrom, the court may

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[17] Beauchamp v. Sturges Burns Mfg. Co., 231 U.S. 320 (1914); Blanton v. Kellioka Coal Co., 232 S.W. 614 (Ky. 1921); *See* 39 YALE L.J. 908 (1930).

[18] 45 U.S.C. §§ 51 *et seq.* (1970).

[19] KRS § 277.320.

[20] KRS § 277.320 further provides that even where a safety statute is not violated by the employer-railroad, the employee's contributory negligence shall not bar recovery but—in comparative negligence fashion—merely diminish recovery in proportion to the amount of negligence attributable to the employee.

[21] RESTATEMENT (SECOND) OF TORTS § 483, comment *c* (1965). Statutes requiring railways to fence their tracks for the protection of livestock may be found to be intended to relieve adjoining landowners of the necessity of . . . restraining their own cattle, even if they do not lack the ability to do so.

[22] Baldwin v. Washington Motor Coach Co., 82 P.2d 131 (Wash. 1938); PROSSER § 36. The Court of Appeals of Kentucky relies largely on the language of the statute or regulation, conditions and circumstances extant at the time of its creation, and the evil it was intended to remedy, in determining the intent of the legislative or administrative body. J. B. Blanton Co. v. Lowe, 415 S.W.2d 376, 378 (Ky. 1967); Brown v. Hobblitzell, 307 S.W.2d 739, 744 (Ky. 1956).

[23] *See* PROSSER § 42, at 244, wherein it is said:

The term "proximate cause" is applied by courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established.

[24] Comment, *Violation of an Administrative Regulation as Negligence Per Se, supra* note 2, at 888.

[25] Home Ins. Co. v. Hamilton, 253 F. Supp. 752, 756 (E.D. Ky. 1966); Morris v. Combs' Adm'r, 200 S.W.2d 281 (Ky. 1947).

[26] Home Ins. Co. v. Hamilton, 253 F. Supp. 752, 756 (E.D. Ky. 1966); Gerebenics v. Gaillard, 338 S.W.2d 216 (Ky. 1960).

determine proximate cause as a matter of law.[27] In accordance with the basic tort-law premise that the legal system ought to leave a loss where it lies unless more good than harm would be accomplished by shifting it,[28] the question of whose act shall be deemed the proximate cause of the injury is answered by the determination of who, as a matter of policy, should bear the loss incurred by the plaintiff.[29]

A Policy Conflict and Its Resolution

Where a defendant's violation of a regulation promulgated in the interest of the safety of the plaintiff and his class concurs with the plaintiff's conduct in the production of the injury, the stage is set for the resolution of two somewhat conflicting policy considerations regarding the apportionment of the loss. In such a situation, the court is confronted on the one hand with the need to protect the plaintiff and his class by securing adherence to regulated standards promulgated to promote their safety. The attachment of liability for negligence to a defendant whose conduct violated the safety regulation appears to be a sanction sufficient to achieve this goal. Contradistinctly, sanctions intended to protect *A* by discouraging negligent, dangerous conduct by *B* must not be made *counter-productive* by encouraging negligent, unreasonable, or unsafe behavior by *A*, secure in the knowledge that his conduct is insulated by *B*'s prior violation of a regulation,[30] so that, regardless of his own acts, the burden of loss from his injury will be shifted to *B*. By way of dictum in a recent opinion,[31] the Court of Appeals of Kentucky indicated its predilection regarding this policy resolution which is inherent in the disposition of an action based on the violation of an administrative regulation as negligence per se and defended on the ground of contributory negligence.[32]

In *Christian Appalachian Project, Inc. v. Berry*,[33] plaintiff's decedent

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[27] Home Ins. Co. v. Hamilton, 253 F. Supp. 752, 756 (E.D. Ky. 1966); Jewell v. Dell, 284 S.W.2d 92 (Ky. 1955).

[28] Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 151 (1961).

[29] Green, *The Torts Restatement*, 29 ILL. L. REV. 582, 606 (1935).
> The judge's function in the determination of duty owed plaintiff by defendant is extremely important. . . . How does the judge know the limits of governmental protection—for it is limits he is called upon to set. Here many factors come into play. For lack of better terminology, let us name them administrative policy, moral policy, economic policy, preventive policy, and the all-comprehensive "justice" policy. It is these policies courts have ordinarily dealt with under *"proximate cause"*.

[30] Keeton, *supra* note 28, at 151:
> In this situation, in counterweight to the utility of the tort cause of action as a deterrent to conduct like the defendant's is the disutility of its encouragement of conduct like the plaintiff's.

[31] Christian Appalachian Project, Inc. v. Berry, 487 S.W.2d 951 (Ky. 1972).

[32] *Id.* at 953.

[33] *Id.* at 951.

son, an adult lacking experience as a swimmer, rented a canoe from the defendant, Christian Appalachian Project, at the latter's recreation center and, without a life preserver, paddled to the middle of the lake where he drowned when the canoe overturned. The elder Berry, in a wrongful death action, argued that the Project had failed to provide young Berry's canoe with a life preserver as required by a boating-safety regulation[34] issued by the Kentucky Department of Public Safety,[35] and that the violation of the regulation constituted negligence per se, rendering the project liable.[36] Through disclaiming the ability to take judicial notice of the regulation because of its improper promulgation,[37] the Court, in reversing a jury verdict in favor of plaintiff, said that even if the regulation had been valid and effective, so that defendant's violation of the standard could be denominated negligence per se, plaintiff would not be entitled to recovery under the Kentucky Wrongful Death Statute[38] since the conduct of decedent, an adult, inexperienced swimmer, in encountering what should have been an obvious risk by renting a canoe and paddling to the middle of the lake without a life preserver, was so unreasonable as to constitute contributory negligence as a matter of law and bar recovery.[39]

Quoting the *Restatement (Second) of Torts*[40] and Dean Prosser,[41] the Court said that contributory negligence may consist not only of the failure to discover, appreciate, or contend with a risk in a manner befitting a reasonable man, "but also in an intentional exposure to a danger of which plaintiff was aware"[42] and that

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[34] Kentucky Dep't of Pub. Safety, Boating Rule 17, 4 KY. ADMIN. REG. SERV. (1972).

[35] Under the reorganization of Kentucky state government, effected in 1973, the Division of Boating was transferred to the Department of Transportation.

[36] 487 S.W.2d at 953.

[37] KRS § 13.085(2) requires that each administrative regulation, to carry the force of law, contain a reference to the statute authorizing its promulgation. KRS § 235.250 authorized Boating Regulation 17. Boating Regulation 17 referred to KRS § 325.250, however—an obvious typographical error. Therefore, Boating Regulation 17 did *not* contain a reference to the statute which authorized it and was invalid. The Court notes that the existence and provisions of the regulation could have been established by pleading and proof, but it declines to take judicial notice of the regulation, as it would otherwise have been authorized to do, in the absence of proper promulgation. 487 S.W.2d at 953.

[38] KRS § 411.130.

[39] 487 S.W.2d at 954.

> [A]pplying the common experience of adults who choose to engage in recreational activities involving the use of canoes, we must regard the conduct of decedent in this case as manifestly unreasonable conduct in encountering a danger that was obvious to any reasonable person under the circumstances claimed to exist by the plaintiff's evidence.

[40] RESTATEMENT (SECOND) OF TORTS § 466 (1965).

[41] PROSSER § 65.

[42] 487 S.W.2d at 954. *See* PROSSER § 35.

> the reasonableness of the decedent's conduct must be determined by balancing the risk against the value which the law attaches to the advantages he is seeking. Where the decedent's conduct clearly involves a risk all out of proportions to its value, such conduct must be regarded as contributory negligence as a matter of law.[43]

The dictum suggests that any sanction to be attached to a defendant's violation of a safety regulation is *completely negated* by contributory negligence on the part of plaintiff (or, as here, in a wrongful death action, decedent). *Berry* appears to be a "hard" case which does not conflict with what may or may not be "bad" law in Kentucky.[44] One who voluntarily exposes himself to known or obvious dangers or those which could be anticipated by one of ordinary prudence is guilty of contributory negligence barring his recovery for resulting injuries.[45] No exception to this rule is provided for a plaintiff whose contributory negligence follows a defendant's violation of an ordinance, statute, or administrative regulation.[46] In *Durham v. Maratta*,[47] although referring to the defendant's violation of an ordinance as the proximate cause of the plaintiff's injury, the Court refused to establish a standard of absolute liability, and provided that the jury must still determine whether the plaintiff was contributorily negligent.[48] Similarly, in *Brown Hotel v. Levitt*,[49] the Court recognized the defense of an intervening force as proximate cause of the injury to an allegation that violation of a statute was negligence per se, and said that the plaintiff's contributory negligence could constitute the intervening force.[50] The Court held in *Gregory v. Paducah Midstream*

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[43] 487 S.W.2d at 954. *See* RESTATEMENT (SECOND) OF TORTS § 466(a), comment *c* (1965).

[44] While the sanction of complete bar to recovery for contributory negligence may serve to discourage negligent behavior by a plaintiff, it does nothing to discourage negligent behavior, or violation of a safety regulation, by a defendant. *See* Keeton, *supra* note 28, at 151. Indeed, in view of the *Berry* dictum, those who supply boats and canoes to the public in Kentucky appear free to violate with impunity and without fear of retribution in tort the requirement that life preservers be provided in all craft, since the act of embarking upon the waters in a vessel *sans* preserver is considered recovery-barring contributory negligence as a matter of law. It is submitted that a system of *comparative negligence*, whereby each negligent actor would bear a proportionate share of the loss, would better serve to encourage both adherence to safety regulations and caution in the encounter of their breach. Any discussion of the implementation of such a system is, of course, beyond the scope of this comment.

[45] Peerless Mfg. Corp. v. Davenport, 136 S.W.2d 779 (Ky. 1940).

[46] *See* Comment, *Negligence Per Se as Proximate Cause of Injury in "Fall-Down" Cases*, 57 KY. L.J. 277 (1967). *See also* RESTATEMENT (SECOND) OF TORTS § 483 (1965).

[47] 195 S.W.2d 277 (Ky. 1955).

[48] *Id.* at 279.

[49] 209 S.W.2d 70 (Ky. 1948).

[50] *Id.* at 71.

Service[51] that defendant's violation of a Kentucky boating regulation constituted negligence, but said that if, upon retrial, plaintiff's conduct is found to have amounted to contributory negligence,[52] plaintiff would be barred from recovery as a matter of law.[53]

Foreseeability

The dictum in *Christian Appalachian Project, Inc. v. Berry*[54] demonstrates that in its effort to determine the proximate cause of, and thus to fix the liability for and the burden of loss from, an injury, the Court places greater emphasis upon the reasonableness of the conduct of a plaintiff in responding to a risk created by a defendant, than upon the *foreseeability* to the defendant that his act or omission would cause injury to the plaintiff. Authorities[55] indicate that throughout the history of the law of negligence, the notion of foreseeability has been intertwined with the development of liability.[56] The factor of foreseeability has been held to be so important that it is not altered by a negligent act of the plaintiff himself:[57]

> when I lent my car to a careless driver, one of the risks that made me negligent was surely the chance that he might hurt himself.[58]

The Kentucky rule, laid down in *Hines v. Westerfield,*[59] is that an original negligent actor who set in motion a chain of events will not be relieved of liability if his act led to an event which one, in view of the experience of mankind, "might have reasonably foreseen."[60] And in *Parker v. Redden,*[61] the Court held that

> the original negligent actor is not relieved of liability by the subsequent negligent acts of another if the subsequent acts might reasonably have been foreseen.[62]

From the facts in *Berry,*[63] it is difficult to conceive how it could reasonably be argued that the defendant could not have foreseen

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[51] 401 S.W.2d 40 (Ky. 1966).
[52] *Id.* at 42.
[53] *Id.* at 43.
[54] 487 S.W.2d 951 (Ky. 1972). *See also* notes 37-39 *supra* and accompanying text.
[55] 2 W. HARPER & F. JAMES, LAW OF TORTS 1134 (1964); PROSSER § 43; *See* Nunan v. Bennett, 212 S.W. 570 (Ky. 1919).
[56] Green, *Foreseeability in Negligence Law,* 61 COLUM. L. REV. 1401 (1961).
[57] Nehbrass v. Home Indem. Co., 37 F. Supp. 123 (W.D. La. 1941).
[58] *Id.* at 126.
[59] 254 S.W.2d 728 (Ky. 1953).
[60] *Id.* at 729.
[61] 421 S.W.2d 586 (Ky. 1967).
[62] *Id.* at 595.
[63] *See* notes 33-36 *supra* and accompanying text.

that the decedent would climb into the canoe and paddle off to the middle of the lake where the absence of a life preserver could result in his death if the boat overturned. To suggest unforeseeability is to contend that the defendant, who provided the decedent with a canoe for rent, could not expect that he would actually *use* it.

However, in *Hines v. Westerfield*[64] and *Parker v. Redden*,[65] the negligent acts subsequent to those of the original negligent actor were performed by *third persons*, not by plaintiff. The determination of which foreseeable occurrences should render a defendant liable, as much as what constitutes the proximate cause of the injury,[66] is a question of policy subject to judicial determination.[67] Accepted as sound is the policy that even where the injury to the plaintiff was foreseeable by the defendant, the plaintiff's act of unreasonably encountering the risk of injury contributes to the injury and thereby bars his recovery.[68] According to the Court, a defendant should not reasonably be expected to foresee what may be termed unreasonable acts of another,[69] and a plaintiff, upon encountering the negligence of a defendant, is neither relieved of the duty to exercise ordinary care for his own safety, nor licensed to walk blindly into dangers which are obvious or known to him or which would be anticipated by a person of ordinary prudence.[70]

Conclusion

The foregoing constitutes an attempt to examine the Kentucky law of negligence in order to determine the consequences of a defendant's violation of a safety regulation as modified by conduct of a plaintiff which is denominated contributory negligence. The dictum in *Berry*[71] is apparently reflective of the Court's determination that, as a matter of policy, even where a defendant's violation of a safety regulation can be characterized as risk-producing negligence, the conduct of a plaintiff in unreasonably encountering that risk is sufficient to shelter the violator from all liability, as if, in effect, the violation had never been committed. This result is not at odds with the rule of long standing that one who voluntarily exposes himself to known or obvious

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[64] 254 S.W.2d 728 (Ky. 1953).
[65] 421 S.W.2d 586 (Ky. 1967).
[66] Green, *supra* note 29.
[67] Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 567 (1962).
[68] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 524(2) (1965).
[69] Spaulding v. Thacker, 415 S.W.2d 586 (Ky. 1967).
[70] Morton v. Allen Constr. Co., 416 S.W.2d 733 (Ky. 1967).
[71] *See* notes 37-39 *supra* and accompanying text.

dangers or those which could be anticipated by one of ordinary prudence is guilty of contributory negligence barring his recovery for resulting injuries.[72] Nevertheless, in contemplating the facility with which the defendant's liability for negligence for violation of a safety regulation was completely negated by an act of plaintiff's deceased son, one might reasonably question the value and usefulness of a sanction which is rendered inapplicable and inoperative by the occurrence of the very evil it was intended to prevent. In view of the *Berry* dictum, those who supply boats and canoes to the public in Kentucky appear free to violate with impunity and without fear of retribution in tort the requirement that life preservers be provided in all craft, since the act of embarking upon the waters *sans* preserver is considered recovery-barring contributory negligence as a matter of law.

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[72] Peerless Mfg. Corp. v. Davenport, 136 S.W.2d 779 (Ky. 1940).