North Dakota Law Review

Volume 26 | Number 2 Article 2

1950

# Laws of Negligence

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# LAWS OF NEGLIGENCE

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THE LAW of negligence, which is no doubt as old as the history of man, in today's complex society is perhaps the one phase of law on which more legal thought is expended than any other single branch of legal jurisprudence. The rules are constantly expanded, both by legislative enactments and judicial interpretations, becoming increasingly more complex. However, certain fundamentals hereafter considered are basic.

Negligence is generally considered as any contact invading another's protected interest, where the conduct falls below the standard established either by legislative enactments or judicial opinion for the protection of others against unreasonable risk of harm. Judicial decision or jury pronouncement using as a standard the conduct of a reasonable man under like circumstances fixes standards for the protection of others against unreasonable risk of harm. In order that negligent conduct may be actionable such conduct must be the legal or proximate cause of the invasion or injury, and the person injured must not have so acted either prior thereto or subsequently in such a manner as to have disabled himself from bringing the action. The act may be either one of omission or commission with like consequences.

The legislative enactment, whether it be by the legislature of the nation, state, municipality, or a commission in its respective sphere, within its particular power, may establish a standard which is final and conclusive, unless it is so vague as to require definition by a court or jury, or application to the facts of a particular situation by the jury. On the other hand, it may also be fixed by judicial decision because of its frequent recurrence under the same or similar circumstances, and thus become a fixed standard which governs the conduct of persons in particular circumstances. Failing this, it becomes the duty of the jury to determine whether or not the particular act at the time and place was below the standard of a reasonable man under the same or similar circumstances.

Furthermore, as a qualification, it must be understood that the violation of a legislative enactment does not under all

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circumstances create liability. This is for the reason that as a condition to its creating a legal liability, violation of a law, ordinance, or rule by an act of omission or commission, it must first be established that the enactment violated was intended exclusively or in part for the benefit of the injured person as an individual, and that the harm done was one the legislative enactment was intended to protect him from, and the harm resulted from the particular hazards which the enactment was designed to protect, and, of course, that the violation was the proximate cause of the injury.[1]

That all violations of legislative enactments of whatever kind or nature do not create civil liability unless they come within the foregoing definition is quite clear. Numerous laws are enacted solely for the purpose of protecting the interests of the state or municipality, or to secure to the individuals as members of the public only, certain rights and privileges, or impose upon persons the duty of performing some service on behalf of the state or municipality for the benefit of the public, and not for the benefit of the individual as a class.

The standard by which the negligence of an act is measured is determined by the acts of a reasonable man under the same or similar circumstances, and applies in all instances except as to children and incompetents. Nevertheless, it is recognized that in the application thereof by the court and jury there are different degrees of care which will be applied by consideration of the qualities of attention, knowledge, experience, intelligence and judgment of the individual. Further, it must be pointed out that the standard of care by which a person's act is measured where it affects others, is the standard of a reasonable man, and where it becomes important on the question of contributory negligence his act is measured as the act of a man of reasonable or ordinary prudence for his own protection. This distinction becomes important, and will be more fully discussed hereafter in connection with contributory negligence.

The fact that there has been an act of negligence and an injury does not of itself indicate legal liability on the part of the negligent individual. Before there is legal liability two things must exist: (1) Negligence, and (2) proximate cause

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[1] Axelson v. Jardine, 57 N.D. 524, 223 N.W. 32 (1928).

as hereinafter defined, disregarding for the moment matters of defense which will nevertheless avoid legal liability.[2]

Negligence, in order to create legal liability, must be the proximate cause of an injury. To be the proximate cause it must involve conduct creating an unreasonable risk of harm to the injured person as a member of a class of persons, who is protected from such act, and the harm must result from the hazard from which he is protected, which hazard is created by the defendant's negligent or wrongful act. Proximate cause is the real cause, probable cause, nearest cause, or the cause without which there is no accident or resulting harm, or as frequently stated, that cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces injury. To arrive at a conclusion as to whether or not an alleged negligent act is a proximate cause of injury the factors which contribute in producing the harm, and the extent to which they contribute in producing it, are considered; whether the negligent conduct has started a force, or series of forces which are in continuous and active operation up to the time of harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible, and lastly, the element of time which has elapsed since the original negligent act.[3]

To constitute the negligent act a proximate cause of resulting injury it is important that the negligent act be more than an incidental factor. It must be a real cause or a substantial factor in bringing about the injury. It is not a substantial factor or real cause in producing an injury if the harm would have resulted even though the defendant had not been negligent,[4] unless it is a concurring act of negligence as one of a number, each acting independently, and each sufficient by itself to bring about the harm.[5] Generally, in order to determine whether or not the negligent act under investigation in a particular set of circumstances is the real or probable cause it is necessary to determine whether there is an unbroken chain of causes and effects leading from the negligent act and resulting in the injury, and further whether the negligent act was of itself a substantial factor in causing the injury.

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[2] Bowers v. Great Northern Ry., 65 N.D. 384, 259 N.W. 99 (1935); Clark v. Payne, 48 N.D. 911, 187 N.W. 817 (1922).

[3] Restatement, Torts §433 (1934).

[4] Wilmes v. Mihelich, 223 Minn. 139, 25 N.W. 2d 837 (1947).

[5] Stockfeld v. Sayre, 69 N.D. 42, 283 N.W. 788 (1939).

The fact that the negligent person could not foresee in advance the result of his negligent act is not of consequence, if harm resulted to a person protected from an act of such nature.[6]

Further, the negligent act is not the proximate cause, if between the original act of negligence and the resulting injury an intervening force brings about the harm as a superseding cause. If the intervening cause is merely an additional cause, or one of concurring negligence, it does not relieve the originally negligent person. On the other hand, where the intervening cause brings about a harm different than would ordinarily have been expected to happen, was acting independently at the time, and was not a result of the original negligence, but usually the result of some wrongful act of a disconnected third person the original wrongdoer is relieved from liability.[7]

If in a factual situation there exists negligence, proximate cause, and resulting injury there still may not be liability because of the existence of some bar which relieves a negligent party from liability, the most important of which is contributory negligence. Numerous other defenses exist which will not be discussed.

Contributory negligence is conduct on the part of the injured person which falls below the standard to which he should conform for his own protection at the time and place, and which is a legally contributing cause, cooperating with the negligence of the defendant in bringing about the harm.[8] Where negligence is any conduct which creates circumstances causing undue risk to others, contributory negligence is conduct which involves an undue risk of harm to the person who sustains the injury. The standard of care is different, in that in negligence the standard is that care which the normal person exercises for the safety of others, while in contributory negligence it is not the standard of the normal man, but of a reasonable prudent normal man exercising care for his own safety. As in negligence, so also in contributory negligence a necessary ingredient is proximate cause or causal relationship between it and the resulting harm—otherwise it is no bar, no matter how negligent the injured party is at the time and place of the accident or injury,[9] and unless the legislature has enact-

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[6] Crowe v. McBride, 25 Cal. 2d 318, 153 P.2d 727 (1944).
[7] State v. Columbus Hall Ass'n, 75 N.D. 275, 27 N.W. 2d 664 (1947).
[8] Restatement, Torts §463 (1934).
[9] Garland v. Nelson, 219 Minn. 1, 17 N.W. 2d 28 (1944).

ed a different rule, usually known as a comparative negligence statute, the common law rule is that an injured person guilty of negligence which contributes to the accident or injury as a proximate cause even in the slightest degree is not entitled to recover.

Nevertheless, a negligent plaintiff may recover if he invokes in his own behalf and brings himself within the doctrine known as Last Clear Chance, the conditions of which are set forth in Section 479, Restatement of the Law of Torts, as follows:

"A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,

(a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and
(b) the defendant
    (i) knows of the plaintiff's situation and realizes the helpless peril involved therein; or
    (ii) knows of the plaintiff's situation and has reason to realize the peril involved therein; or
    (iii) would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise, and
(c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

On point (b) - (iii) of the foregoing there is considerable disagreement among the courts with respect to the duty to discover as is shown in a comprehensive annotation contained in 92 A. L.R. 47. To date, it does not appear that North Dakota has adopted the rule that a defendant who should have discovered plaintiff's situation is nevertheless negligent. In numerous cases where railroad companies have been involved the rule perhaps is based on the fact there is no duty on the part of the railroad to discover trespassers upon its property. However, in the case of *Acton v. Fargo & Moorhead St. Ry.*,[10] and in the later case of *Ramage v. Trepanier*,[11] it would appear that the rule is applicable also in non-railroad cases, and the United States Circuit Court of Appeals for this district in the

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[10] 20 N.D. 434, 129 N. W. 225 (1910).
[11] 69 N.D. 19, 283 N.W. 471 (1938), noted, 16 N.D. Bar Briefs 163 (1939).

case of *State of North Dakota v. N. P. Ry.*,[12] indicates that the rule is definitely established in this state that there is no duty to discover.

Another phase of the law of negligence which deserves consideration because of its frequent appearance, possibly due to the guest law in the state of North Dakota, is the matter of imputed negligence. It is well established that the negligence of the driver is not imputed to the passenger, be he invitee or guest of the driver, unless their relationship is such as to give to the passenger some element of control.[13] Furthermore, imputed negligence is separate and distinct from the doctrine of contributory negligence as a non-negligent passenger may be barred from recovery if under the circumstances the negligence of his host driver may be imputed to him whereas even though contributory negligence of the host driver may not be imputed to the passenger the passenger may be guilty of independent contributory negligence which will bar recovery.[14]

Worthy of note is an interesting phase of the doctrine of imputed negligence in connection with property damage. Not established in this state but fairly well settled in other states is the rule that an owner of a vehicle in the possession of a bailee may recover from a negligent third person even though the bailee at the time and place of the accident was guilty of contributory negligence, which would bar recovery by the bailee.[15] That this might also be the result in North Dakota is suggested in the case of *Zettle v. Lutovsky*,[16] where the court says:

"In our consideration of this case we have adopted the theory upon which the case was tried in the district court and upon which it was submitted to this court on appeal. At no time during the course of the proceedings did the plaintiffs contend that contributory negligence of plaintiffs' bailee was not a defense to the action. In fact it appears that plaintiffs conceded it was a proper defense if it could be established. The fact that we have considered the questions as presented is not to be construed as a holding on our part that the negligence of a bailee will preclude recovery by a bailor for injury to his automobile."

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[12] 171 F. 2d 506 (8th Cir. 1948).

[13] Christopherson v. Minneapolis-St. P. & S. S. M. Ry., 28 N.D. 128, 147 N.W. 791 (1914).

[14] Wilson v. Oscar Kjorlie Co., 73 N.D. 134, 12 N.W. 2d 526 (1944).

[15] Christensen v. Hennepin Transportation Co., 215 Minn. 394, 10 N.W. 2d 406 (1943). See Note, 147 A.L.R. 945 (1943).

[16] 72 N.D. 331, 7 N.W. 2d 180 (1942).

That law is not an exact science is never more clearly evidenced than by an examination of the reported cases involving the law of negligence. As no two snowflakes are exactly alike, so are no two cases exactly alike. However, to the factual situations must be added as ingredients witnesses, counsel, court and jury, resulting in decisions apparently conflicting and involving situations seemingly similar.

# NORTH DAKOTA BAR BRIEFS

VOLUME 26 APRIL, 1950 NUMBER 2



The North Dakota Bar Briefs is published quarterly in January, April, July and October by the State Bar Association of North Dakota. Communications should be directed to: The Executive Director, North Dakota Bar Association, Box 327, Grand Forks, North Dakota.