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TORTS: NEGLIGENCE PER SE — APPARENT STATUTE VIOLATION—STANDARD USED TO DETERMINE CIVIL LIABILITY WHEN BY A TECHNICAL IRREGULARITY THERE IS ONLY AN APPARENTLY VALID STOP SIGN

In the *Clinkscales* case¹ the decision of the California Supreme Court clarifies the province of the court in the field of negligence based upon the violation of an ordinance or statute. The case is particularly informative because the existence of an apparent but not an actual violation of a traffic regulation calls for a discrimination as to the principles that operate in a statutory negligence *per se* situation.²

The action was brought to recover damages for the death in an automobile collision of one Clinkscales, the husband of one of the plaintiffs. The deceased was driving west on what appeared to be a protected highway when his car was struck by that of the defendant, who drove through a stop sign at an intersection. The stop sign had been established in 1936 by a road foreman with the permission of the district county supervisor in order "to give gravel trucks the right of way".

The evidence showed that the ordinance which was relied upon as authorizing the installation of the stop sign was invalid because of defective publication. The procedure in the Vehicle Code governing the authorization of stop signs was not observed.

The trial court admitted in evidence a general resolution of the board of supervisors on the subject of the establishment of boulevard stops, but this resolution did not of itself validly authorize the posting of the stop sign at the intersection where the accident occurred. Nevertheless, according to the appellate court's decision,³ reversing the verdict for the plaintiff, the effect of the trial's court's instructions was "to tell the jury that this stop sign was legally posted in accordance with the provisions of the Vehicle Code, that persons travelling on Oat Canal Road had the right of way at this intersection, and that the appellant's admitted failure to stop at this stop sign constituted negligence as a matter of law".⁴

The verdict of the jury for the plaintiffs was set aside by the appellate court on the ground that the jury was not only instructed

¹ *Clinkscales et al. v. Carver* (1943) 22 Cal. (2d) 72, 136 P. (2d) 777.

² See: 38 AM. JUR., *Negligence*, 158-170; 18 MCK. CAL. DIG., *Negligence*, 89-94.

In California the decisions do not clearly hold that the violation of a statute is conclusive of negligence. (*Giorgetti v. Wollaston* (1927) 83 Cal App. 358, 257 Pac. 109; *Mora v. Favilla* (1921) 186 Cal. 199, 199 Pac. 17. The presumed negligence may be rebuttable. See notes: (1924) 13 CALIF. L. REV. 428 (1931) 20 *ibid.* 340.

³ *Clinkscales et al. v. Carver* (1942) 126 P. (2d) 906.

⁴ *Ibid.* at 907.

that the defendant's failure to stop at the stop sign was negligence *per se*, but "the assumed fact that this was a legally established stop sign may well have been a determining factor in the jury's determination of the related questions as to contributory negligence on the part of the deceased and the proximate cause of the accident".⁵

The appellate court in its reversal declared that the question of whether "it was negligent as a *matter of fact* for the appellant to disregard this stop sign even though it had been placed there without proper authorization" was not before the jury, and "the action was not tried or presented to the jury upon such an issue".⁶

In the majority opinion of the supreme court the standard of care accepted as proper is the same as if there had been an actual violation of a criminal statute. Justice Traynor observes, "The propriety of taking from the jury the determination of negligence does not turn on defendant's criminal liability", but the court itself in a clear case may adopt the apparently valid statutory precaution relied on by the public, as the standard of what could be expected of the "reasonably prudent man".⁷

The court has taken a step in the direction of Justice O. W. Holmes' idea, namely, court determination in many negligence cases of the standard of conduct or precautions required. Even in statutory violation cases it is the court which *adopts* the statutory standard, as certain able writers have contended.

On the basis of the decision in the *Clinkscapes* case the following principles appear to be controlling in a negligence suit arising out of the violation of a criminal statute:⁸

(1) The formulation of the standard of care to be applied is within the province of the court and is not dependent upon the statute.

(2) The standard of the statute determines civil liability as between parties in a relation to create a duty of care only because the court finds the statute appropriate and accepts the standard as embodying the court's conception of the conduct required of a reasonably prudent man.

(3) The statutory standard has value to the court principally as a generalization from the experience of the community, but will not be accepted and applied where it would impose

⁵*Ibid.* at 907. In other words, a determining factor as to deceased's right to rely on the sign.

⁶*Ibid.* at 908.

⁷See Morris, *The Relation of Criminal Statutes to Tort Liability* (1933) 46 HARV. L. REV. 453, 465-467.

⁸The significant language of the opinion on this problem follows (italics supplied):

liability without fault, that is, where there are some possible excuses or qualifications.

In this situation there is no doubt as to the facts. It is simply a question of application of the legal standard to the facts. The court finds a sufficient basis for negligence *per se* simply in the fact that a common law duty, as defined by the court, was, under the circumstances existing, clearly violated by the defendant.⁹

The freedom which the court possesses to adopt or not adopt a statutory standard of care in situations comparable to that of the *Clinkscales* case is reasserted in the latest California decision which cites the *Clinkscales* case.¹⁰ In *Mathers v. Riverside County*¹¹ Justice Carter declares:

"A court *may or may not accept* the standard of conduct prescribed in a criminal statute as a basis of a civil suit for negligence,

"A suit for damages is based on the theory that the conduct inflicting injuries is a *common-law tort*, in this case the failure to exercise the care of a reasonable man at a boulevard stop. The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. The decision as to what the civil standard should be *still rests with the court*, and the standard formulated by a legislative body in a police regulation or criminal statute *becomes the standard to determine the civil liability only because the court accepts it*. In the absence of such a standard the case goes to the jury, which must determine whether the defendants has acted as a reasonably prudent man would act in similar circumstances. . . . When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court *accepts* the formulated standards and applies them except where they would serve to impose liability without fault. . . . Even if the conduct cannot be punished criminally because of irregularities in the adoption of the prohibitory provisions, the legislative standard may nevertheless apply *if it is an appropriate measure for the defendant's conduct*. When the court accepts the standard, it rules in effect that defendant's conduct falls below *that of a reasonable man as the court conceives it*. . . . If a through artery has been posted with stop-signs by the public authorities in the customary way and to all appearances by regular procedure, *any reasonable man should know that the public naturally relies upon their observance*. . . . Such irregularity does not relieve a person from the duty to exercise the care of a reasonable man under such circumstances. Otherwise a stop-sign would become a trap to innocent persons who rely on it." *Supra* note 1, 22 Cal. (2d) at 75, 76; 136 P. (2d) at 778, 779.

⁹The discussion in *Osborne v. McMasters*, *supra* note 2 at 544, shows clearly the distinction between a *common law duty* and a *statutory standard which formulates the measure of such duty*.

¹⁰The closest situation factually to the *Clinkscales* case that a search has revealed is that occurring in *Arkansas State Highway Commission v. Mode et al.*, (1941) 203 Ark. 179, 157 S. W. (2d) 53. Here a bridge, not legally posted with warning signs as to load it would sustain, was damaged by the defendant's agent when the agent drove a truck and trailer excessively loaded upon the bridge. It was held negligence *per se* for the driver to violate the warning, regardless of whether or not the highway engineer had authority to place a warning sign on the bridge. The dissenting judge defended the trial jury's finding for the defendant, and held that if a rule had been violated, such a "violated rule" was at best only evidence of negligence and not conclusive of that fact.

¹¹*Mathers v. Riverside County et al.* (1943) 22 Cal. (2d) 781, at 785, 141 P. (2d) 419, at 422. Italics supplied.

and if it does not, the trier of fact must determine whether the actor has conducted himself as a man of ordinary prudence. The standard fixed by a criminal statute is not necessarily under all circumstances the standard in a civil action for negligence. Its violation may not constitute negligence as a matter of law where such violation occurs as the result of acts in emergencies under the proper circumstances."

The court is here left free to reject the standard of care set up by the criminal statute where "such violation occurs as the result of acts in emergencies under the proper circumstances". In this expected situation the jury determines the existence of actionable negligence.

A recent Massachusetts case¹² involving a traffic accident caused by the unavoidable stoppage of a truck on the highway at night illustrates the wisdom of permitting the court to formulate the standard of care to be applied in any particular tort situation without being bound by a criminal statute. In Massachusetts "a civil cause of action does not arise merely out of violation of a penal statute to secure safety, unless a legislative intent to create such a cause of action appears by express language or by clear implication".¹³

The statute required the posting of flares when a truck stopped at night on the highway. The driver's trailer lost one of the outside rear dual wheels, and the driver put the wheel back into position in order to keep the trailer from tipping over. This operation took five minutes, and before the flares could be set out and in spite of a warning by flashlight, the plaintiff's car collided with the stopped vehicle. By agreement the facts were found by an auditor.

The Massachusetts court declared:¹⁴

"The issue in these cases is not whether Kenny violated the statute. The issue is whether he was negligent. . . . It is possible for a person to violate a statute like that here involved and at the same time to exercise the care of the ordinarily prudent person in all the circumstances and therefore not to be negligent. . . . In this case the auditor found that 'a reasonably sufficient time to permit the defendant Kenny' to place the flares had not elapsed, 'and so his failure to set them out was not negligence on his part'. This is in substance a finding that even if Kenny violated the statute, he nevertheless acted as a reasonable man and was not negligent."

It is submitted that as regards practical and desirable effects the Massachusetts rule of the *Harsha* cases and the rule of the *Clink-scales* case are virtually indistinguishable. The Massachusetts court

¹²*Harsha v. Bowles* (two cases) *Harsha v. Kenny* (two cases) (Oct. 29, 1943) 314 Mass. —, 51 N. E. (2d) 454.

¹³*Ibid.* at 455.

¹⁴*Ibid.* at 455.