South Carolina Law Review

Volume 11 | Issue 2 Article 4

Winter 1959

Negligence Per Se in South Carolina: The Effect Given in Civil Actions to the Violation of Criminal Statutes

F. Dean Rainey Jr.

NEGLIGENCE PER SE IN SOUTH CAROLINA: THE EFFECT GIVEN IN CIVIL ACTIONS TO THE VIOLATION OF CRIMINAL STATUTES

An increasingly important phase of tort litigation is the effect of the violations of criminal statutes and ordinances in determining civil liability. As the number of motor vehicles on our highways grows, the more need there is for regulation of traffic by statutes and ordinances to provide safe travel. Similarly, with our increasing industrial growth, there is a corresponding increase in need for safety regulations in this field. The result is that the application of these statutes and ordinances in civil litigation is becoming a routine rather than an unusual occurrence.

In a discussion of the problems arising out of these situations, it is well to point out that the precise language of the statute involved is very important in determining how the statute is to be applied. Some statutes contain provisions as to civil liability which, of course, will control over any prevailing general rule as to the effect to be given statutory violations. Even in the case of statutes which only provide for criminal penalties, there is variation in the particular urgency of the purposes of such statutes which could conceivably have an effect on their application in civil actions. Due to the infinite number of statutes of various types, only the general effect of criminal statutes with no controlling provisions for civil liability will be dealt with in this note.

Once a criminal statute containing no provisions for civil liability has been found applicable to a given case, there are two main effects given to a violation of such a statute on the issue of negligence by the courts. The majority rule is that such a violation is negligence as a matter of law or negligence per se[1] while the minority view treats such a violation as merely evidence of negligence or prima facie negligence.[2]

Under the majority view, the issue of negligence in violating a statute is taken from the jury.

However, this does not mean that the question of ultimate liability

1. *E. g.*, Cosby v. Flowers, 249 Ala. 227, 30 So. 2d 694 (1947); Satterlee v. Orange Glenn School District, 29 Cal. 2d 581, 177 P. 2d 279 (1947); Mundy v. Pire-Slaughter Motor Co., 146 Tex. 314, 206 S. W. 2d 587 (1947).

2. *E. g.*, McKenzie v. Friel, 326 Ill. App. 258, 61 N. E. 2d 407 (1945); Sithko v. Jastrzebski, 68 R. I. 207, 27 A. 2d 178 (1942): Roberts v. Neil, 138 Me. 105, 22 A. 2d 135 (1941).

is taken from the jury, since it still must be shown that this negligence was the proximate cause of the injury. Also, such an act of negligence is subject to the same defenses as a common law act of negligence such as contributory negligence.[3]

The minority view as to the effect of these statutory violations, that they are only evidence of negligence or prima facie evidence of negligence, still permits the case to be sent to the jury on the issue of negligence solely on the basis of the statutory violation but does not make such a violation conclusive on the issue. Thus, the defendant can introduce evidence showing due care upon which the jury can find that he was in fact not negligent in spite of the violation of the statute. The merits of each of these theories can be argued at length,[4] but since the South Carolina Supreme Court has upheld with few variations the majority rule that a statutory violation is negligence as a matter of law,[5] this discussion will be confined to the problems arising out of the application of this rule in South Carolina.

The South Carolina Supreme Court has generally held from the earliest cases, with the possible exception of the cases under the Pure Food Statute, that the violation of a statute or ordinance is negligence per se or negligence as a matter of law. The first cases in which the rule was applied involved the violation of the crossing signal statutes by railroads.[6] Later, in *Dyson v. Southern Ry.*,[7] the violation of a local speeding ordinance was declared to be negligence per se upon the authority of these crossing signal cases. Mr. Justice Gary, dissenting, thought that the signal statute cases were distinguishable since these statutes were capable of exact compliance by erection of blowposts at the proper distance from the crossing, but in case of speeding ordinances, the railroad had no exact means of being sure of compliance except by running well under the speed limit. This distinction has never been followed, however, and today the Court generally declares nearly all statutory violations in civil actions to be negligence per se or negligence as a matter of law.

The fact that a violation of a statute or ordinance is proven does not mean it is negligence in every situation.[8] Before a violation of a

3. Watson v. Sprott, 135 S. C. 362, 126 S. E. 488 (1925).
4. Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COL. L. REV. 21 (1949).
5. McBride v. A. C. L. R. R., 140 S. C. 260, 138 S. E. 803 (1927); Cirsosky v. Smathers, 128 S. C. 358, 122 S. E. 864 (1924).
6. Strother v. So. Ca. & Ga. R. R., 47 S. C. 375, 25 S. E. 272 (1896).
7. 83 S. C. 354, 65 S. E. 344 (1909).
8. See cases cited in notes 10 and 11 *infra*.

statute is declared negligence per se, two other factors must be shown. First, it must appear that the injury to the plaintiff was of the type which the statute was designed to guard against,[9] and second, that the plaintiff was within the class of persons intended to be protected by the act.[10] If these factors do not appear, it is clear that the plaintiff gains no rights under the statute and no new duties are placed on the defendant which were not existent at common law. In *Lancaster v. City of Columbia*,[11] where an action was brought for personal injuries resulting from the plaintiff's stumbling over a defect in the sidewalk, the city set up as a defense of contributory negligence the fact that the plaintiff was violating a city ordinance requiring persons to walk on the right hand side of the sidewalk. The Court held the ordinance was inapplicable since it manifestly was to prevent collisions and there was no collision involved here.[12] Also, in *Smoak v. Martin*,[13] the Court held that a party could claim no right from a statute requiring autos to travel on the right hand side of the road where, while traveling on the left hand side of the road himself, he ran into a car parked on the left hand side of the road and headed in the same direction. The statute was said to be only for the protection of autos coming from the opposite direction.[14] Therefore, in both of these cases even though there was a violation of a statute or an ordinance, it did not affect the rights of the parties, since in the first case, the injury was not of the type the ordinance was designed to guard against, and in the second case, the party claiming the right was not within the class of persons protected by the statute.

In early cases in some jurisdictions, the courts have construed statutes and ordinances strictly in determining whether they were applicable in civil actions. In *Chase v. N. Y. Cent. R. R.*,[15] a 1911 Massachusetts case, the court held that parties riding in an unregistered auto could not recover from the defendant railroad for damages sustained in a crossing collision in which the railroad failed to give the statutory signals. The reason given was that the signal statute was entitled "An Act for the Better Protection of Travelers at Railroad Crossings", and since the plaintiff's auto was unregistered,

9. Lancaster v. City of Columbia, 104 S. C. 288, 88 S. E. 463 (1916).
10. Smoak v. Martin, 108 S. C. 472, 94 S. E. 869 (1918).
11. 104 S. C. 288, 88 S. E. 463 (1916).
12. *See* Young v. City of Camden, 187 S. C. 414, 198 S. E. 45 (1938); Jeffords v. Florence County, 165 S. C. 15, 162 S. E. 574, 81 A. L. R. 313 (1932).
13. Smoak v. Martin, 108 S. C. 472, 94 S. E. 869 (1918).
14. *See* Wright v. South Carolina Power Co., 205 S. C. 327, 31 S. E. 2d 904 (1944); Cirsosky v. Smathers, 128 S. C. 358, 122 S. E. 864 (1924); Hutto v. Southern Ry., 100 S. C. 181, 84 S. E. 719, L. R. A. 1915D 962 (1915).
15. 208 Mass. 137, 94 N. E. 377 (1911).

they did not have the status of "Travelers" within the meaning of the statute. This is an extreme holding and is clearly not the law in South Carolina.[16] Even in the earlier cases, the South Carolina Court has tended to construe such statutes and ordinances liberally. In the 1910 case of *Lindler v. Southern Ry.*[17] the South Carolina Court went nearer to the opposite extreme from that of the *Chase* case. In that case, the defendant had parked a train partially blocking a street crossing in violation of a city ordinance prohibiting the stopping of a train on any such crossing under the penalty of a fine. The plaintiff was injured as he was attempting to pass through the unblocked part of the crossing when the defendant's train emitted steam without warning, causing loud noises which frightened the plaintiff's horse. The defendant argued with apparent logic that the horse was clearly not frightened by the blocking of the crossing in violation of the ordinance but solely by the emission of steam by the parked train. Hence, the technical violation of the statute was immaterial and the real question would be whether the emission of steam was negligence. The Court through Justice Gary said that the emission of steam was incidental to the operation of an engine and could not be considered apart from the violation of the ordinance. The purpose of this ordinance would seem to be merely to prevent the obstruction of the streets and injuries caused thereby. The Court was probably influenced by the fact that there is strong evidence for finding the defendant to be negligent apart from the ordinance violation. At the time of this case, carelessly making loud noises such as this in close proximity to a public street could reasonably have been foreseen to have frightened a horse.

In *Bell v. A. C. L. R. R.*[18] the Court affirmed a verdict for actual damages sustained when the plaintiff was struck by a piece of planking kicked up by a passing train at a railroad crossing. The plaintiff alleged as negligence among other things the violation of a statute requiring railroads to fill in around the rails at grade crossings so as to provide a safe and easy passage across the tracks. A piece of the planking used for the filling had apparently been loose even though the defendant's station master had inspected it shortly before the accident and had not noticed any defect. The defendant argued that since the plaintiff was not using the crossing but only standing near it and watching the passing train, he was not within the class of persons the statute was intended to protect. The majority of the

16. Cirsosky v. Smathers, 128 S. C. 358, 122 S. E. 864 (1924).
17. 84 S. C. 536, 66 S. E. 995 (1910).
18. 202 S. C. 160, 24 S. E. 2d 177 (1943).

Court in a 4 to 1 decision held that there was evidence from which the jury could find that the plaintiff intended to use the crossing as soon as the train passed and therefore was within the protected class. In this case also, there might have been common law liability, without the statute, for negligently allowing loose planking to be left near the tracks in a vicinity where people would likely be injured if such planking were kicked up by the train.

However, in the case of *Hutto v. Southern Ry.*[19] the only act of negligence alleged against the railroad was a violation of the signal statute requiring the trains to blow their whistles 500 yards from a public crossing. The plaintiff alleged that he was unhitching his plow horse in a field a short distance from the crossing when the train came by unexpectedly and frightened the horse causing the plaintiff's injury. The Supreme Court reversed a verdict for the plaintiff on the grounds that since he was not using the crossing, he was not within the class of persons the statute was intended to protect. It was pointed out that even though the statute had been construed to guard against injuries caused by the frightening of horses as well as collisions,[20] it would be extending it too far to construe it to protect persons not using the crossing. The Court reasoned that if the statute protected this party although he was not using the crossing, it might just as well be construed to protect a person anywhere along the track. It would not be reasonable to place on the railroad a duty to such persons.

These cases seem to show a liberality by the South Carolina Court in construing these statutes to apply, especially when the surrounding circumstances indicate a just result.

Even if a party has violated an apparently applicable statute or ordinance, he may still escape liability by showing his conduct was excusable under the circumstances.[21] In *Walker v. Lee*,[22] one of the leading cases in the United States on this point, the South Carolina Court went so far as to hold that a party is bound to violate such a statute or ordinance if by doing so he can avoid inflicting injury to person or property. In that case, while driving on the right hand side of the road in compliance with the statute, the plaintiff collided with the defendant who was driving on the wrong side of the road. The Court decided that the plaintiff was not free of contributory

19. 100 S. C. 181, 84 S. E. 719, L. R. A. 1915D 962 (1915).
20. Spears v. A. C. L. R. R., 92 S. C. 297, 75 S. E. 498 (1912).
21. Walker v. Lee, 115 S. C. 495, 106 S. E. 682 (1921); Sims v. Eleazer, 116 S. C. 41, 106 S. E. 854 (1921).
22. *Ibid.*

negligence just because he was on the right side of the road but that if he could have, by using due care, avoided the collision by swerving to the left, he was bound to do so.

Once it has been decided that there has been a violation of an applicable statute without legal justification, it still remains to be determined whether such a violation was the proximate cause of the injuries sustained, just as it would be if common law negligence was involved.[23] Justice Cothran, in one of the leading cases on this question in South Carolina,[24] said that the only difference in an act which is negligence per se and an ordinary act of negligence is in the ". . . particular branch of the legal machinery of the trial which adjudicates the question and characterizes the act; in the one case, the judge, and in the other the jury." The proximate cause question was said to be unaffected by the distinction. This rule has been followed in numerous cases and is without a doubt the law in South Carolina. Since the manner of determining the proximate cause of an injury is generally the same in the case of statutory violations as it is in the case of common law negligence, discussion of this point will be limited to a few variations.

One factor considered in a few cases by the South Carolina Court in determining if an injury is proximately caused by the violation of a statute, which is necessarily not present in the case of common law negligence, is whether the injury is of the type the statute was designed to guard against by the legislature. Analytically, this consideration would seem out of place on this issue, since if the injury was not of such type, the statute should not be applicable in the first place.[25] Nevertheless, the Court in one case discussed this factor in deciding the proximate cause issue without even questioning the applicability of the statute to the case.[26] Also, where there is a collision at a railroad crossing, and it is shown that the railway signal statute has been violated, the Court has said that since this is exactly the type of injury the statute was designed to protect against, there arises a presumption that the failure of the railroad to give the required signals was the proximate cause of the injury.[27] An examination of a few of these cases might help explain this peculiarity.

23. Chapman v. Associated Transport, Inc., 218 S. C. 554, 63 S. E. 2d 465 (1951); Eickhoff v. Beard-Laney, Inc., 199 S. C. 500, 20 S. E. 2d 153, 141 A. L. R. 1010 (1942); Locklear v. Southeastern Stages, Inc., 193 S. C. 309, 8 S. E. 2d 321 (1940).
24. Cirsosky v. Smathers, 128 S. C. 358, 363, 122 S. E. 864 (1924).
25. Lancaster v. City of Columbia, 104 S. C. 288, 88 S. E. 463 (1916).
26. Ayers v. Atlantic Greyhound Corp., 208 S. C. 267, 37 S. E. 2d 737 (1946).
27. McBride v. A. C. L. R. R., 140 S. C. 260, 138 S. E. 803 (1927); Strother v. So. Ca. & Ga. R. R., 47 S. C. 375, 25 S. E. 272 (1896).

The case of *Ayers v. Atlantic Greyhound Corp.*[28] involved a collision between an automobile and one of the defendant's buses which was stopped on a highway in violation of a statute. The sole issue was whether the bus driver's negligence in violating the statute was the proximate cause of the plaintiff's injury. The Court in considering the surrounding circumstances of the collision decided that since the bus had been parked in a depression on the highway with the lights of another parked bus facing in the direction of approaching automobiles and further obstructing the driver's vision, it was reasonably foreseeable that an oncoming automobile might perhaps negligently collide with the parked bus. The Court further said:

> Our present decision is buttressed by the further consideration that the unfortunate accident before us is just such as it must have been anticipated (by the framers of the requirements of flares and of parking or stopping off the traveled portion of the highway) would be prevented by observance of the regulations. This is helpful in the solution of the problem of proximate cause. . . .[29]

The Court seemed to base this reasoning on a quotation from *McBride v. A. C. L. R. R.*[30] which in turn was quoting from *Ruling Case Law.*[31] The pertinent portion is as follows: "If the very injury has happened which was intended to be prevented by the statute law, that injury must be considered as directly caused by the non-observance of the law." This statement also appears in *American Jurisprudence.*[32]

In the *McBride* case, the Court used this same quotation from *Ruling Case Law* in sustaining a lower court jury charge to the effect that in the case of a railroad crossing collision, where there was a violation of the statute requiring trains to ring a bell or blow a whistle upon approaching a crossing,[33] there arises a presumption that the statutory violation was the proximate cause of the injuries sustained. This statute was declared inapplicable to the case on another ground but the Court discussed in detail the cases establishing this presumption. This presumption was first stated in *Strother v. So. Ca. & Ga. R. R.*[34] with no authority or reasoning given to support it. After stating this rule the Court in that case went on to

28. 208 S. C. 267, 37 S. E. 2d 737 (1946).
29. *Id* at 277, 37 S. E. 2d at 741.
30. 140 S. C. 260, 138 S. E. 803 (1927).
31. 20 R. C. L., *Negligence* § 37 p. 43-44 (1918).
32. 38 AM. JUR., *Negligence* § 166 p. 838 (1941).
33. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 58-743.
34. 47 S. C. 375, 25 S. E. 272 (1896).

follow *Wragge v. So. Ca. & Ga. R. R.*[35] in construing the language contained in the signal statute, "that such neglect contributed to the injury", so as not to require the plaintiff to show that the defendant's statutory violation was the proximate cause but only that said violation contributed to the injury in some way. The *Wragge* case holding was subsequently overruled[36] but the rule laid down in the *Strother* case as to the presumption of proximate cause was followed by the Court in several cases prior to the *McBride* case upon the principle of stare decisis without any further justification being given.[37] In the *McBride* case the Court continued to follow the precedent laid down by these earlier cases but undertook to rationalize the rule upon the theory that the legislature when passing this statute evidently considered that injury to person and property was very likely to occur at a railroad crossing unless such signals were given. This theory was supported by the above quotations from *Ruling Case Law.* The Court said: ". . . the presumption arises that the failure to give the signals is the proximate cause of the injury, since such injury is the natural and probable consequence of the failure to give the signals and is the very injury intended to be prevented by the statute."[38]

In a discussion of the reasoning of the Court on this point, it might be well to look at the source of the quotation from *Ruling Case Law* which seems to be the basic authority for the conclusion. The quoted language was taken by that encyclopedia from the West Virginia case of *Norman v. Virginia-Pocahontas Coal Co.*[39] which involved a violation of a child labor act wherein the plaintiff, an employee of the defendant and under 14 years old, was suing for the loss of a leg during the course of his employment. It is significant that in this case, the court did not hold that a presumption would arise that the violation of the statute was the proximate cause of the injury. The court held that the plaintiff must introduce evidence to prove "that the injury indeed proceeded from the unlawful employment," and said nothing to the effect that it was up to the defendant to introduce evidence showing that the violation was not the proximate cause. It is also clear that this injury was of the type the legislature intend-

35. 47 S. C. 105, 25 S. E. 76 (1896).
36. Turbyfill v. Atlanta & Charlotte Air Line Ry., 83 S. C. 325, 65 S. E. 278 (1909); Burns v. Southern Ry., 65 S. C. 229, 43 S. E. 679 (1903); Bowen v. Southern Ry., 58 S. C. 222, 36 S. E. 590 (1900).
37. Peeples v. Seaboard Air Line Ry., 115 S. C. 115, 104 S. E. 541 (1920); Lee v. Northwestern R. R., 84 S. C. 125, 65 S. E. 1031 (1909); Drawdy v. Atlantic Coast Line R. R., 78 S. C. 374, 58 S. E. 980 (1907).
38. McBride v. A. C. L. R. R., 140 S. C. 260, 274, 138 S. E. 803, 807 (1927).
39. 68 W. Va. 405, 69 S. E. 857, 31 L. R. A. (N. S.) 504 (1910).

ed to prevent. Thus, the Court in the *McBride* case is actually placing a different construction on the language quoted than did the court which spoke the language.

In the *Ayers* case[40] where a bus was illegally parked on the highway in such a position as to be nearly invisible to approaching motorists and in the *McBride* case[41] where the train had failed to give the required signals and had hit a person crossing the tracks, it is not surprising for the Court to say that these injuries were the things which the legislature was trying to prevent and that therefore the statutory violations were more likely to be the proximate causes of these injuries. It might also be undisturbing when the Court goes so far as to declare that a presumption arises that these violations were the proximate cause of the injuries.

However, a violation of such statutes is not always so obviously the proximate cause of the injury. This is clearly illustrated in the case of *Coleman v. Levkoff*.[42] There, the plaintiff admittedly was driving 18 m.p.h. in a 15 m.p.h. speed zone when he collided with the defendant's parked car. The court would not direct a verdict for the defendant on the ground of the plaintiff's admitted contributory negligence. It is apparent that such a collision is one of the types of injuries a speeding statute is designed to prevent, but in this case it does not so logically follow that the violation was the proximate cause of the collision. The Court pointed out that it could not be said with any degree of certainty that the collision would not have occurred had the plaintiff been traveling the required 15 m.p.h.

The Court seemed to recognize this difficulty in the case of *Lawrence v. Southern Ry.*[43] In that case while violating a speeding statute, the plaintiff collided with a railroad box car parked partially blocking the street. The defendant argued the *McBride* case reasoning, in that the speeding statute was passed to prevent collisions such as this and therefore a presumption arose that the plaintiff's violation was the proximate cause of the injury and would bar his recovery. In this case, the Court would not accept this argument and held that no presumption arose. The Court said that the presumption of proximate cause established in the *Strother* case[44] was founded upon high probability due to the increased number of crossing accidents after the passing of the signal statute. But the Court also attempted

40. Ayers v. Atlantic Greyhound Corp., 208 S. C. 267, 37 S. E. 2d 737 (1946).
41. McBride v. A. C. L. R. R., 140 S. C. 260, 138 S. E. 803 (1927).
42. 128 S. C. 487, 122 S. E. 875 (1924).
43. 169 S. C. 1, 167 S. E. 839 (1933).
44. Strother v. So. Ca. & Ga. R. R., 47 S. C. 375, 25 S. E. 272 (1896).

to distinguish the violation of a speeding statute from the violation of a crossing signal statute in that the former had a much broader field of coverage and protected a larger class of people. This would seem to imply that a presumption of proximate cause would still arise in the case of a violation of a statute intended for the benefit of a limited class, similar to the signal statute, if the injury was of the type the statute was passed to guard against. However, the Court seemed to recognize the deficiency in the above reasoning as evidenced by their strong rationalization of the holding of the *Strother* case upon the grounds of high probability, a ground which was not brought out in the *Strother* case or in any of the cases following it. This would clearly be a better ground for giving rise to a presumption than the reasoning given by the *McBride* case, and since the *Strother* case itself gave no grounds at all for the rule, there would seem to be little reason to adopt the rationalization of the *McBride* case over that of the *Lawrence* case.

Today, it should be safe to say that one could not likely get the Court to declare a presumption of proximate cause to arise upon the violation of a statute, except in the case of a violation of the signal statute, for the sole reason that the injury sustained was of the type the statute was intended to prevent.[45] It is a well established rule, as has been pointed out, that it must be shown that the injury is of such type before the statute can be applied in the first place, but once this has been established the plaintiff still must show by evidence that the injury was proximately caused by the violation of the statute. To merit the aid of a presumption in this showing,

45. *See* Jones v. Carpenter, 160 S. C. 401, 158 S. E. 823 (1931), wherein the following charge was upheld: " 'That the violation of the Criminal Statute which is designed to promote the safety of travel upon public highways of this State constitutes negligence *per se*, and *if an injury to person or property results from such violation*, there is a presumption of law that such violation is the proximate cause of the injury' . . . . " [emphasis in original] Carter, J., speaking for the Supreme Court, held this charge to be non-prejudicial to the plaintiff. Cothran, J., concurred on the grounds that the italicized phrase in the charge saved it from error. The Court in Lawrence v. Southern Ry., 169 S. C. 1, 167 S. E. 839 (1933), discussed this case and agreed with Justice Cothran. In the cases of Tinsley v. Parris, 174 S. C. 412, 178 S. E. 496 (1935) and Dodenhoff v. Nilson Motor Express Lines, 190 S. C. 60, 2 S. E. 2d 56 (1939) similar charges were upheld on the authority of the above cases. But, the latest comment of our Court on this point is in the case of Myers v. Evans, 225 S. C. 80, 81 S. E. 2d 32 (1954). In that case Justice Oxner pointed out that although there was not a presumption of proximate cause arising out of a traffic statute violation, our Court has sustained a charge like that in Jones v. Carpenter, *supra*, in several cases. But the Justice went on to say: "While we have held that a charge of this nature with the italicized words added does not constitute prejudicial error, it is confusing, since if an injury results from the violation of a statute, there is no room for a presumption. It is, therefore, better to omit any instruction concerning presumptions in the case of the violation of a highway statute."

it would probably take a further showing of extrinsic circumstances such as were discussed in the *Lawrence* case that would make it more likely than not that the violation of the particular statute was the proximate cause of the collision or some other conventional ground for the application of a presumption.[46]

As to the effect of the Court's language in the *Ayers* case[47] that the fact of the injury being of the type the statute was passed to prevent supported its finding that the violation of the statute proximately caused the injury, it was probably not meant that such a showing was in itself sufficient to base a jury finding that the violation was the proximate cause. If that were the case, the issue would be taken from the jury since it is the function of the Court and not the jury to determine the construction to be placed on a statute. It is likely that the Court was merely pointing out the justice of the jury's finding by saying, and correctly so, that this is why we have statutes.

CIVIL SUITS UNDER THE PURE FOOD STATUTE

Another troublesome area in the application of the negligence per se rule in South Carolina has arisen in civil suits brought under the Pure Food Statute[48] which makes it a misdemeanor for a party to sell adulterated or unwholesome food. Under the normal application of the rule, if it is shown that the food or drink contained impurities and that the defendant manufactured it, then this should be negligence as a matter of law on the part of the defendant, if it appears that the plaintiff was within the class of persons protected by the statute and the injury was of the type the statute was intended to guard against. The only question left for the jury should be whether the injury was proximately caused by the defendant's negligence. However, confusion has arisen in the South Carolina cases from the use of such language as "negligence is implied from such violation" or that such a violation is "prima facie evidence of negligence" and also from the Court's allowing want of negligence to be shown as a defense,[49] all of which is inconsistent with holding that the violation of a statute is negligence as a matter of law.

The source of this confusion seems to be the case of *Tate v. Mauldin*[50] in which the Court was first faced with a civil action

46. MCCORMICK, EVIDENCE § 309, p. 641 (1954).
47. Ayers v. Atlantic Greyhound Corp., 208 S. C. 267, 37 S. E. 2d 737 (1946).
48. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 32-1511 *et seq.*
49. Floyd v. Florence Nehi Bottling Co., 188 S. C. 98, 198 S. E. 161 (1938); Burnette v. Augusta Coca-Cola Bottling Co., 157 S. C. 359, 154 S. E. 645 (1930); Tate v. Mauldin, 157 S. C. 392, 154 S. E. 431 (1930).
50. 157 S. C. 392, 154 S. E. 431 (1930).

for injuries resulting from adulterated food. There a judgment for the plaintiff was affirmed for injuries resulting from the plaintiff's drinking a Coca Cola containing the decayed carcass of a mouse. Although the Court recognized the fact that a violation of the food statute was shown, the decision was mostly concerned with common law principles bearing on liability for selling impure food. The Court quoted extensively from a Tennessee case[51] involving similar facts but in which no mention was made of a pure food act and which was therefore entirely based on the common law. The quotation emphasized that "[t]his liability is based on an omission of duty or an act of negligence, and the way should be left open for the innocent to escape." The South Carolina Court then received the evidence introduced by the defendant showing the modern equipment and sanitation methods employed in the bottling process and the resulting high improbability of an impurity getting into the bottles. It was pointed out that even if there was no evidence of negligence in the testimony, the jury could base a verdict for the plaintiff on the failure to properly inspect the bottles before they left the plant. Also the jury had visited the plant and could conclude that the defendant was negligent on the basis of that visit in spite of there being no evidence of negligence. The quotation from the Tennessee court and the subsequent laborious effort to find in the record evidence of common law negligence of the defendant to support the jury's verdict strongly implies that the Court held such negligence to be a necessary element of liability in addition to the violation of the Pure Food Statute.

The Court also quoted several passages from *Corpus Juris* having to do with various aspects of common law liability for selling impure food along with a few having to do with liability under the Pure Food Statute. The passages having to do with common law negligence further indicated that acts of negligence other than the violation of the statute must be shown.[52] In one passage the statement was made that "[w]ant of negligence on the part of the defendant is a defense to an action of trespass on the case for selling unwholesome food."[53]

51. Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155, L. R. A. 1916B 877, Ann. Cas. 1917B 572 (1915).

52. "A person who sells articles of food is under a legal duty to exercise reasonable care to insure their being wholesome and fit for consumption, and is liable in an action ex delicto on the ground of negligence for any injury resulting from their being unwholesome or unfit if he knew, or by exercise of reasonable care could have known, their defective condition." 26 C. J., *Food* § 90, p. 783 (1921), quoted in Tate v. Mauldin, 157 S. C. 392, 397, 154 S. E. 431, 433 (1930).

53. 26 C. J., *Food* § 100, p. 787 (1921), quoted in Tate v. Mauldin, 157 S. C. 392, 398, 154 S. E. 431, 433 (1930).

This statement would seem to indicate clearly that the violation of the Pure Food Statute is not conclusive on the issue of negligence. From the statement itself, it is not ascertainable whether it applies to an action brought under a pure food statute or only to common law suits. Upon looking at the context of the *Corpus Juris* section from which this quotation was taken it will be noted that the case cited as authority for the proposition[54] does not involve the violation of a pure food statute. It will also be noted that the case cited deals with a suit against a packing company for injuries sustained by the contracting of trichinosis by the plaintiff from pork packed by the defendant. The defendant introduced as a defense evidence showing the following facts: that trichina worms are only visible under a microscope and such an inspection is impractical and untrustworthy; that no system known to science is reliable for such an inspection; that the only sure way of eliminating the danger is to thoroughly cook the pork at a temperature of at least 140°. It was also shown that it was the policy of the U. S. Government not to inspect for trichina worms since it would tend to give a false sense of security to the public and possibly induce laxity in the cooking precaution. It seems questionable whether this sort of case can be said to be authority for the broad proposition that want of negligence is a defense to an action under the violation of a statute which is held to be negligence per se. Actually, the defendant in that case has shown the impossibility of compliance with the Pure Food Statute in the case of trichina worms and further, that the only reliable means of protection in this case, lies in the hands of the consumer himself: that is, the thorough cooking of the pork. This would seem to fall into the line of cases involving justifiable violations of statutes discussed heretofore in this note. It would not seem to warrant permitting the jury to find that a defendant bottling company was not negligent on the ground that it showed evidence of a modern and sanitary plant in the face of a showing that a contaminated bottle in fact was sold by the defendant in violation of the Pure Food Act.

The concurring opinion of Justice Carter in the *Tate* case is helpful in alleviating the confusion in stating that the selling of the contaminated drink amounted to a violation of the food statute and was negligence per se and it was not necessary that specific acts of common law negligence be shown by the plaintiff.

The problem raised by the *Tate* case was further shown in two similar cases handed down in the same term of court. In one of these

54. Tavani v. Swift & Co., 262 Pa. 184, 105 Atl. 55 (1918).

cases the Court's holding implied that the violation of the food statute was merely evidence of negligence or raised a presumption of negligence while the other case was clearly consistent with the rule that such a violation is negligence as a matter of law.

The former was the case of *Burnette v. Augusta Coca-Cola Bottling Co.*[55] in which the Court upheld a verdict for the defendant denying the plaintiff damages resulting from drinking a contaminated Coca Cola bottled by the defendant. In the charge to the jury, the trial judge stated as follows:[56]

> We have a statute in this state which makes it a misdemeanor for any person dealing in drinks sold to the public to allow *through gross negligence* any of these things known as deleterious or unsound or putrid. We have a statute that makes such things a misdemeanor, but the general law is that one who manufactures or sells an article for public consumption, whether it be food or drink, must use due care to see that such article is fit, safe, and proper for human consumption. [emphasis added]

The Court then charged the jury, after rewording a request of the plaintiff, that negligence per se does not of itself entitle the plaintiff to recover but that it must be further shown that such negligence proximately caused the injury. This was the substance of the plaintiff's request with a heavier emphasis placed on the proximate cause element and is a correct statement of the law.

The Court also charged a request of the defendant which first asserted that a manufacturer of food for public consumption is only bound to use ordinary and reasonable care to prevent impurities and is not an insurer of the absolute purity of his product. The remainder of the charge was as follows:[57]

> . . . So in this case I charge you that you would not be warranted in finding a verdict against the defendant from the mere fact that a bug or other insect was found in the bottle in question, but the plaintiff must go further and prove for your satisfaction by the greater weight of the evidence, not only that the bug or insect was in the bottle, but also that its presence in the bottle was due to the negligence and carelessness of the defendant, before you can find a verdict for the plaintiff in this case.

The majority of the Supreme Court held these charges to be sustained by the decision in the *Tate* case. Again Justice Carter dis-

55. 157 S. C. 359, 154 S. E. 645 (1930).
56. *Id.* at 362-363, 154 S. E. at 646.
57. *Id.* at 366, 154 S. E. at 648.

agreed and in this case wrote a dissenting opinion on the ground that the charge stated that the statute prohibited selling impure food only through "gross negligence" and therefore gave the jury an incorrect impression of the force and application of the statute. He also pointed out that the statutory violation was negligence per se and the plaintiff did not have the burden of showing how the impurities got in the bottle nor did he have to show any other act of negligence on the part of the defendant.

The clear import of the charge taken as a whole would seem to be that something more than merely the violation of the statute must be shown and therefore such a violation is merely evidence of negligence or raises a presumption of negligence. However, the majority of the Court was correct in saying that the charge was sustained by the opinion in the *Tate* case as can be seen in the above discussion of that case.

These two cases would seem to establish an exception to the negligence per se rule in South Carolina if it had not been for the case of *Culbertson v. Coca-Cola Bottling Co.*[58] which was the third of the series of cases handed down on this point in the Spring Term of 1930. This case also involved injuries received from drinking a Coca Cola bottled by the defendant containing deleterious matter. The jury was charged here that if the defendant violated the Pure Food Statute, he is liable for all injuries resulting therefrom regardless of his knowledge of the impurity of his product. The defendant was said to be bound to know whether his product was sound and complied with the statute. The defendant objected to this charge on the grounds that it made the manufacturer liable for unavoidable accidents and thus a guarantor of his product. The Supreme Court again held that this charge was controlled by the decision in the *Tate* case and therefore was correct. It seems clear that if the manufacturer is bound to know whether his product is sound and wholesome when it leaves the factory, then he is negligent as a matter of law when an unwholesome product is sold on the market. This case seems to be the soundest of the three and is in line with the general rule that the violation of a statute is negligence per se. The later cases seem to follow this view certainly to the extent that no other acts of negligence are required to submit the case to the jury.

In the case of *Gantt v. Columbia Coca-Cola Bottling Co.*[59] the Court upheld the submission of the issue to the jury where it was pointed out that there was not a vestige of evidence of negligence

58. 157 S. C. 352, 154 S. E. 424 (1930).
59. 193 S. C. 51, 7 S. E. 2d 641, 127 A. L. R. 1185 (1940).

on the part of the defendant other than the violation of the Pure Food Statute. Although the Court quotes from an earlier case[60] that the violation of the Pure Food Act was prima facie evidence of negligence, which in turn was based on the authority of the *Tate* case, it goes on specifically to hold, in line with Justice Carter's concurring opinion in the latter case and his dissent in the *Burnette* case to the effect that the violation of the food statute is negligence per se.

It might be well to point out that this case also reaffirmed a portion of the troublesome quotation from the Tennessee case as set out in the *Tate* case and quoted hereinabove to the effect that the foundation of liability is negligence and it is ". . . based on an omission of duty or an act of negligence and the way should be left open for the innocent to escape." Since, as pointed out above, the Tennessee case did not involve a pure food statute, the quotation is still ambiguous as applied to these cases but taking the opinion of the *Gantt* case as a whole, the only reasonable meaning that can be given to the passage is that the word "negligence" includes a violation of the pure food statute.

In *Hobbs v. Carolina Coca-Cola Bottling Co.*[61] the Court quoted another of the *Corpus Juris* sections cited in the *Tate* case to the effect that negligence is "implied" from the violation of the Pure Food Statute.[62] However, as in the *Gantt* case, the Court proceeds to state also that such violation is negligence "per se" or negligence in itself and the opinion taken as a whole seems to give this impression although the specific issue as to whether the violation was negligence per se or only implied negligence was not before the Court.

In the case of *Boylston v. Armour & Co.*,[63] which contained the next comment of the Court on this point, it was said that "[i]n such cases, proof of common law negligence was unnecessary because of the established rule that violation of the statute is per se negligence . . . . "[64] This language, however, was dictum in this case since the statute was held inapplicable to out-of-state manufacturers.

In *McKenzie v. Peoples Baking Co.*[65] in 1944 the Court stated that ". . . evidence of violation of the Pure Food Statute implies

60. Floyd v. Florence Nehi Bottling Co., 188 S. C. 98, 198 S. E. 161 (1938).
61. 194 S. C. 543, 10 S. E. 2d 25 (1940).
62. "If a manufacturer of a food product disobeys the prohibition or neglects to perform the duty imposed by a pure food statute, negligence is implied from such violation or neglect, and he is liable for injury resulting from the unwholesomeness of such food product regardless of his knowledge of its unwholesomeness." 26 C. J., *Food* § 93, p. 785 (1921).
63. 196 S. C. 1, 12 S. E. 2d 34 (1940).
64. *Id.* at 10, 12 S. E. 2d at 38.
65. 205 S. C. 149, 31 S. E. 2d 154 (1944).

negligence and requires submission to the jury of the issue thereby raised, and that this is true even if the testimony negatives negligence in the manufacture of the food."[66]

Then the Court went on to say that the *Gantt* case firmly established that such a violation was negligence per se.

The next case involving the point came up in 1953 in *Tedder v. Coca-Cola Bottling Co.*[67] in which it was held that ". . . the violation of the Pure Food and Drug Act is negligence *per se* and that a plaintiff need do nothing more than prove a violation of the said Act. . . ."[68]

But in 1954 in the case of *Peters v. Double Cola Bottling Co. of Columbia*[69] the Court made the following statement of the rule:[70]

> A violation of this statute [Pure Food] is negligence *per se*. . . . Substantially all food products today on sale are either canned, packaged, or bottled, which means that explanation for adulteration of food involves information normally within the control of either the retailer or the manufacturer, and without the knowledge of the consumer. Accordingly there is good reason for the rule which allows the plaintiff to make out a *prima facie* case by showing a violation of the statute. Thereafter, a defendant may adduce evidence to show that there has been, in fact, *no negligence*, it being in the last analysis a question for the jury unless, of course, the evidence is susceptible of only one reasonable inference. [emphasis added]

It will be noted that this language is clearly dicta since the only issue on appeal was whether a motion for change of venue was properly refused.

Likewise, in the latest case on the point, *Turner v. Wilson*,[71] the Court made the following statement: "Under our decisions proof of the violation of the Pure Food Act, Section 32-1511 *et seq.* of the 1952 Code. makes but a *prima facie* case of negligence."[72] The *Gantt*, *Tedder* and *Peters* cases were cited as authority for this proposition.

The first thing that appears in an analysis of these cases is that the terms "negligence per se" and "prima facie negligence" apparently are used interchangeably by the South Carolina Court. In several of these cases both terms are used without any attempt to distinguish

66. *Id.* at 153, 31 S. E. 2d at 156.
67. 224 S. C. 46, 77 S. E. 2d 293 (1953).
68. *Id.* at 50, 77 S. E. 2d at 295.
69. 224 S. C. 437, 79 S. E. 2d 711 (1954).
70. *Id.* at 443, 79 S. E. 2d at 713.
71. 227 S. C. 95, 86 S. E. 2d 867 (1955).
72. *Id.* at 101, 86 S. E. 2d at 870.

between them. A possible reason for this is that in none of these cases would the distinction have a real effect on the result. In the case of negligence per se, a want of negligence or due care on the part of the defendant cannot be the basis of a verdict for the defendant since the violation of the statute is in itself negligence. If the violation of the statute is only prima facie negligence, then the defendant can be held to be free of negligence upon evidence of due care.[73] But in both cases, the violation of the statute is sufficient to submit the issue of the defendant's liability to the jury and thus when the Supreme Court is reviewing the evidence to determine its sufficiency, one rule is just as good as the other. If the issue was squarely before the Court, it no doubt could be argued that the *Tate* case, through one of its *Corpus Juris* quotations, said that want of negligence is a defense to such an action and from that, the rule must be that a violation of the Pure Food Statute is only prima facie negligence. This contention is supported by the language of the *Peters* case and the *Turner* case which are the two latest cases on the point. However, the outcome is doubtful due to the repeated holding of our Court that the violation of a statute is negligence per se in cases involving other statutes and also in most of the cases involving this statute. Also, as has been pointed out above, this particular quotation from *Corpus Juris* is based on very doubtful authority and probably is not the law in most jurisdictions.

Even though it is doubtful whether the South Carolina Courts apply the negligence per se rule in its normal sense to violations of the food statute, the later cases are clearly consistent to the extent that the South Carolina Court at least holds such a violation to be prima facie evidence of negligence and that no separate acts of negligence are required to submit the issue to the jury. Yet, portions of the *Tate* case and the *Burnette* case which are inconsistent with this rule have never been overruled and, in fact, the cases are occasionally cited as being in accord with the accepted rule.[74]

It is, of course, possible to pick and choose from the language of

73. In the case of Whaley v. Ostendorff, 90 S. C. 281, 73 S. E. 186 (1911) the Court, in reversing a lower court charge that the violation of a traffic ordinance was prima facie negligence, pointed out the following: "When evidence of negligence is only *prima facie*, it is subject to rebuttal, but when there is negligence *per se*, it is conclusive of that question. The fact that there is negligence *per se*, does not, however, tend to show, that such negligence is actionable. The question whether negligence is actionable, depends upon the further question, whether such negligence was the direct and proximate cause of the injury."

74. *See* Tedder v. Coca-Cola Bottling Co., 224 S. C. 46, 77 S. E. 2d 293 (1953); Hobbs v. Carolina Coca-Cola Bottling Co., 194 S. C. 543, 10 S. E. 2d 25 (1940).

the *Burnette* and *Tate* cases and come out with a correct statement of the law but parts of these opinions are obviously inconsistent with either view as to violations of the food statute. For instance, in *Tedder v. Coca-Cola Bottling Co.*[75] the Court affirmed the lower court's refusal to give a charge patterned after that approved in the *Burnette* case, quoted hereinabove, without distinguishing or overruling that case.

This was unquestionably correct under the authority of the *Gantt* case, since the charge asserted that the plaintiff must show that the impurity got into the bottles by the defendant's negligence, but it would have been helpful if the portion of the *Burnette* case sustaining this proposition had been overruled.

There are several possible reasons for the confusion resulting from the application of the negligence per se rule as to violations of the Pure Food Act. One which was suggested by Judge Lide in the *Gantt* case was that the earlier cases over-emphasized the rather meager circumstantial evidence of the defendant's negligence in an effort to avoid resort to the doctrine of res ipsa loquitur, which has been repeatedly held not to be the law in South Carolina, while only incidentally mentioning that the violation of the statute was negligence per se. Another is that it seems obvious that the Court in the *Tate* case, except for Justice Carter, failed to recognize the full significance of a pure food statute as affecting the common law theories of liability of a manufacturer of food products. Perhaps an underlying reason for this apparent oversight could be the hesitancy of courts to hold a manufacturer of foods liable as an insurer or guarantor of his product. The holding that a violation of a pure food statute is negligence as a matter of law is a much harsher rule than such a holding in the case of traffic or similar statutes. The pure food statute does not purport to prohibit one specific act or omission such as failure to inspect, screen, disinfect, etc., but simply prohibits the selling of impure, adulterated foods no matter how such impurities or adulteration came about. An analogous traffic statute would prohibit drivers from having collisions. However, the broadness of the food statute would not seem to warrant an exception to the negligence per se rule since the legislature clearly intended to impose a heavy criminal liability on food sellers due to the dangerous results which could follow from selling impure food. If they are criminally liable, there is no reason why they should not be civilly liable for the injuries proximately caused by the violation of this statute as they would be in the case

75. 224 S. C. 46, 77 S. E. 2d 293 (1953).

of the violation of other statutes. Dean Prosser in his treatise on torts[76] pointed out that the trend of the law is to hold the manufacturer absolutely liable to the consumer for injuries sustained from defects in his product. He said that while this result is commonly obtained by variations of the warranty doctrine, in the case of food and drugs it can also be reached on a theory of negligence under the criminal penalties for the sale of defective products which have been provided by some statutes. That is, some of the statutes are construed to impose an absolute duty not to sell bad food and hence give rise to strict liability. In support of this proposition, one of the cases cited is the *Culbertson* case.[77]

Perhaps another of the cases cited in support of the above proposition gives a clearer illustration of the application of this rule. In the case of *Kelly v. John R. Daily Co.*,[78] a 1919 Montana case, the plaintiffs were injured by eating contaminated pig's feet sold by the defendant. The defendant apparently went into a detailed discussion of the common law theories upon which defendant's liability could be based and concluded that the complaint had not stated a cause of action under any of the said theories. The court said the defendant's argument was "beside the mark" and would only have been in point if there had not been a pure food statute in the state. It was said that when the plaintiff alleged that the defendant had sold him impure food, he, in effect, charged him with a violation of the pure food statute which was of itself legal negligence. It only remained to be shown that the violation was the proximate cause of the injury to the plaintiff. The court went on to say ". . . the sale of adulterated food is absolutely prohibited. The seller is made the insurer of the purity of the food products sold by him, and guilty knowledge on his part is no longer an ingredient of the offense." This is the import of the *Culbertson* case in South Carolina although it has never been followed to its logical conclusion by specifically holding that a seller of food products is a guarantor of the purity of his product. This does not make the defendant absolutely liable since the common law defenses to an assertion of negligence are still available to him. He can show evidence of contributory negligence, intervening acts of third parties, that the negligence per se was not the proximate cause and so on. These defenses seem to be more realistic than simply introducing evidence of a sanitary plant and modern equipment in an effort to show the impossibility of the impurities getting into the

76. PROSSER, TORTS § 84, p. 509 (2d ed. 1955).
77. 157 S. C. 352, 154 S. E. 424 (1930).
78. 56 Mont. 63, 181 Pac. 326 (1919).

products. In short, the attitude of the legislature is that if the contamination of the product occurred while it was still in the hands of the defendant, he should be held liable; but if it occurred thereafter, he should not. The application of the negligence per se rule given its normal effect would seem to be the most practical means of achieving this result. If it is shown that the bottle contained an impurity and it proximately caused injury to the plaintiff, then the defendant's only line of escape should be that such impurity got into the bottle after it left the defendant's hands.

SUMMARY

In summarizing this discussion it can be seen that as a general rule the violation of a statute or ordinance in South Carolina is held to be negligence per se. Our Court has not been technical in construing the legislature's objective in passing these statutes and ordinances and as a result they have been liberally applied in civil actions.

In the case of a violation of the railroad signal act, the Court has gone so far as to say that a violation of the statute is not only negligence per se but also gives rise to a presumption that the violation was the proximate cause of the injury. But in the case of the Pure Food Act, the Court has been jumping back and forth between the negligence per se rule and the rule that a violation of a statute or ordinance is only prima facie negligence. As was pointed out, the presumption of proximate cause rule has been fairly definitely confined to the violations of the railroad signal act. However, the inconsistency of the Court's holdings under the Pure Food Act is still a serious problem. To clear up the confusion in the cases on this point, the South Carolina Court should hold such violations to be negligence per se, and it is likely that the Court will so hold, if the issue is put squarely before it. Such a holding would be consistent with the holdings in connection with the violation of other statutes in South Carolina and would also be consistent with the trend of the cases from other jurisdictions, as well as in accord with the views of the textwriters. There is no good reason for making an exception to the negligence per se rule in the case of the Pure Food Statute.

F. DEAN RAINEY, JR.