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RECENT CASES

AUTOMOBILES — PROXIMATE CAUSE — VIOLATION OF PARKING ORDINANCE AS NEGLIGENCE PER SE — The defendant parallel parked his automobile at a street curbing. The plaintiff thereafter parked his vehicle immediately behind that of the defendant making it impossible for the defendant to extricate his automobile. After waiting ten minutes and failing to find a policeman, the defendant finally backed up and moved forward several times with considerable force. The defendant succeeded in moving plaintiff's vehicle backwards several feet but also did considerable damage to the front end of the plaintiff's car. Plaintiff brought suit. The lower court gave judgment for the defendant. On appeal, it was *held* the fact that the plaintiff violated a District of Columbia parking ordinance requiring three feet of clearance between cars did not justify the lower court in holding that the plaintiff was guilty of contributory negligence per se. The plaintiff assumed the risk of having his car damaged accidentally but he could not be called upon to anticipate that defendant would repeatedly back into his vehicle with such force. A reversal was ordered. *Conn v. Hillard,* 82 A.2d 368 (D.D.C. 1951).

A municipal corporation, acting under the residuary powers of the state,[1] may establish the conduct of a reasonable man by ordinance.[2] When enacted within the defined limitations, such ordinances have the same force as a statute enacted by the legislature and are similarly construed by the courts.[3] It is through such expressed [4] and implied [5] authority, emanating from the state legislature, that municipalities have regulated traffic and the use of the streets within the corporate limits. Without exception, the basis for such ordinances is to protect the public, as a class, from a particular harm.[6] Accordingly the moving party is not held liable for the violation of an ordinance unless the harm suffered was of the kind which the enactment was intended to prevent,[7] and the injured a member of the class protected.[8] The violation

1. *E.g.* N.D. Rev. Code §40-0501 (1943): "The governing body of a municipality shall have the power: 1. To enact or adopt all such ordinances . . . not repugnant to the constitution and laws of this state, as may be proper and necessary to carry into effect the powers granted to the municipality. . . ."

2. Bott v. Pratt, 33 Minn. 323, 23 N.W. 237 (1895); Restatement, Torts §285, comment (b); Prosser, Torts 264 (1941).

3. See *e.g.* Bott v. Pratt, 33 Minn. 323, 328, 23 N.W. 237, 239 (1885): "An ordinance which a municipal corporation is authorized to make, is as binding on all persons within the corporate limits as any statute or other laws of the commonwealth. . . ."

4. *E.g.* N.D. Rev. Code §40-0501 (17) (1943): "To regulate traffic and sales upon the streets, sidewalks, and public places;"; §40-0501 (18) "To regulate the speed of vehicles and locomotives within the limits of the corporation;" §40-0502 (14) "To regulate, control or restrict within designated zones or congested traffic districts, the use of the streets. . . ."

5. See note 1, *supra.*

6. Meincke v. Oakland Garage, 11 Cal.2d 255, 79 P.2d 91 (1937) (jaywalking was a violation of an ordinance); Leek v. Western Union Telegraph Co., 20 Cal. App.2d 374, 66 P.2d 1232 (1937) (walking against red light in violation of an ordinance); Prosser, Torts 269-270 (1941).

7. Klotz v. Tru-Fruit Distributors, 173 So. 592 (La. 1937) (parking a truck by a hydrant, in violation of an ordinance, was not causal connection for bicyclist's injury when struck by a suddenly and negligently opened truck door); Elliott v. Montgomery, 135 Me. 372, 197 Atl. 322 (1938) (parking a truck on left side of street, in violation of an ordinance, is not causal connection to a collision caused by the driver being blinded by the sun); Restatement, Torts §286 comment (h).

8. Swift v. City of New York, 270 N.Y. 162, 200 N.E. 681 (1936) (ordinance requiring barriers around excavations in streets was enacted for protection of travellers on the streets, not to protect playing children); Folds v. City Council of Augusta, 40 Ga. App. 827, 151 S.E. 685 (1930) pedestrian injured by truck, the driver violating an ordinance which sets out rules of operation).

of an ordinance, however, can be asserted both as a defense, as well as, the basis for an action,[9] since the enacting body established the conduct of a reasonable man by ordinance. Thus the plaintiff's duty to exercise reasonable care for his own safety is coexistent with the defendant's duty toward the plaintiff.

The courts are in conflict upon the question of whether an ordinance violation is negligence per se or merely evidence of negligence.[10] Most courts seem, however, to have adopted the view that a violation constitutes negligence per se,[11] but some few jurisdictions still consider an infraction of a safety ordinance as merely evidence of negligence.[12] The prevailing view has been criticized in that it is improper to presume that a civil liability can be inferred from the violation of a duty imposed by statute.[13] A further criticism has been that a municipality, enacting traffic ordinances, does not possess the authority to create new civil rights.[14] Such a view is, however, largely nullified because to deny a civil remedy is to ignore the court's obligation to give the fullest effect to the intent and policy of the legislating body.[15] This appears eminently logical since traffic ordinances and statutes, which establish the rules of the road, are enacted principally to prevent injury to all motorists, and frequently others.

In the instant case, the court stated that although the plaintiff parked his vehicle illegally he could not be held to have anticipated the defendant's subsequent actions. The defendant's actions were for this reason considered as constituting an intervening act, and the plaintiff's ordinance violation as not being the proximate cause of his injury. The court's strict limitation as to what are foreseeable circumstances seems inconsistent with an earlier

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9. Tilbury v. Powell, 191 Okla. 435, 130 P.2d 830 (1942) (plaintiff failed to display a red light on his vehicle, also failed to pull over to the curb when stopping); McBride v. Gill, 15 So.2d 643 (La. 1943) (plaintiff was exceeding the residential speed limit); Richards v. Pass, 277 Mass. 372, 178 N.E. 643 (1931) (plaintiff and defendant both violated different ordinances); Meincke v. Oakland Garage, 11 Cal.2d 255, 79 P.2d 91 (1937) (plaintiff was jaywalking in violation of an ordinance) (the court applied the following test: "These facts are clear: (1) That plaintiff was violating an ordinance designed to prevent the very character or type of injury which plaintiff received; (2) that the violation of this ordinance continued to the very moment of impact; and (3) that the injury would not have occurred if plaintiff had not been violating the ordinance."); Restatement, Torts §469.

10. Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920) "Courts have been reluctant to hold that the police regulation of boards and councils and other subordinate officials create rights of action beyond the specific penalties imposed. This has led them to say that the violation of a statute is negligence, and the violation of a like ordinance is only evidence of negligence . . . the distinction has not escaped criticism."

11. Danzansky v. Zimbolist, 105 F.2d 457 (D.C. Cir. 1939); Folds v. City Council of Augusta, 40 Ga. App. 827, 151 S.E. 685 (1930); White v. North Carolina R. Co., 216 N.C. 79, 3 S.E.2d. 310 (1939); Bott v. Pratt, 33 Minn. 323, 23 N.W. 237 (1885) (first case in Minnessota which clearly held that a violation of an ordinance constitutes negligence per se).

12. McBride v. Gill, 15 So.2d 643 (La. 1943); Aetna Casualty & Surety Co. v. Lee, 10 La. App. 763, 123 So. 137 (1929); *accord,* Oklahoma Producing & Refining Corp. v. Freeman, 88 Okla. 166, 212 Pac. 742 (1923) (driving on the wrong side of the street, in violation of a city ordinance, is prima facie evidence of negligence).

13. Lowndes, *Civil Liability Created by Criminal Legislation,* 16 Minn. L. Rev. 361, 364 (1932).

14. Thayer, *Public Wrong and Private Action,* 27 Harv. L. Rev. 317, 320-321 (1914).

15. *Id.* at 341-343; also see Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814, 815 (1920): "By the very terms of the hypothesis, to omit wilfully, or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform."

District of Columbia decision.[16] In that case it was held that the violation of an ordinance, by leaving the key in a parked vehicle, was the proximate cause of an injury resulting from the unauthorized and negligent use of the vehicle by another. In the instant case, the ordinance, requiring that a three-foot space be maintained between parked vehicles, was undoubtedly enacted to facilitate parking, and prevent the identical situation from arising in which the present defendant found himself. The *quaere* arises as to whether or not the court here has largely nullified the ordinance which was obviously adopted to prevent the inconvenience and damage incurred here by the defendant and plaintiff.[17]

WILLIAM E. PORTER

BAILMENT — LIMITATION OF LIABILITY ON STORAGE RECEIPT — APPLICABILITY TO SEPARATE AGREEMENT TO REPAIR — REMEDY OF INSURER. Plaintiff insurance company, as subrogee, brought an action to recover the value of a fur coat that was lost or stolen while in possession of the defendant furrier, who had contracted to store and repair it. Aware of the coat's $2000 insured value, defendant suggested to the owner that a minimum value of $100 be placed upon it to avoid further insurance. The owner agreed and a storage receipt specifying the $100 valuation was issued, and liability limited to that amount. After being repaired, the coat disappeared on the way to the cold storage vaults. Plaintiff paid the owner the full $2000 valuation and sought recovery against the defendant on the ground that there were two contracts, that defendant was negligent under the alteration contract, thereby rendering inapplicable the liability limitation in the contract for storage. On appeal from a judgment in favor of the defendant, it was *held* that plaintiff was limited to the $100 valuation. A dissenting opinion adhered to the theory that two separate bailment contracts were executed, and that the limitation in the storage contract had no application to the bailment for repairs. *Lumbermen's Mutual Insurance Co. v. F. Z. Cikra, Inc.* 95 N.E.2d 230 (Ohio 1950).

The majority opinion disregarded the element of separate contracts solely on the validity of the receipt limiting the liability of the bailee to the specified $100. The dissent logically points out that the storage contract never became effective because the coat never reached storage, and also that payment for repairs was separate from and in addition to the payment for storage, therefor, the limitation could not be effective. In contending for liability for the full value the dissent relied upon a former Ohio case.[1]

Although it has been contended to the contrary,[2] bailment is generally conceded to be a contractual relationship.[3] Indirectly, a bailment may be said to be the rightful possession of goods by one who is not the owner, that the

16. Ross v. Hartman, 139 F.2d 14 (D.C.Cir. 1943).
17. Defendant in this instant case could possibly have counter claimed. See Harnick v. Levine, 106 N.Y.S. 460 (1st Dist. 1951) (where motorist unable to extricate his vehicle because the defendant had double parked, in violation of a city ordinance, brought suit and was allowed recovery for discomfort and inconvenience).

1. Aetna Casualty & Surety Co. v. Higbee Co., 80 Ohio App. 437, 76 N.E.2d 404 (1947), *rev'd.* on other grounds.
2. Paton, *Bailment: Property or Contract?* 23 Aust. L.J. 591 (1950).
3. Story, Bailments 5 (9th ed. 1878).