THE IOWA DOCTRINE OF NEGLIGENCE PER SE REVIEWED

An article in 8 DRAKE LAW REVIEW 110 (1959) entitled *"Effect of Statutory Violations in Automobile Negligence Actions in Iowa"* explained the Iowa doctrine, established in 1932 by *Kisling v. Thierman*,[1] that violations of statutory rules of the road are negligence per se.[2] In the five years since that article, the Iowa Supreme Court has dealt with the doctrine on many occasions and has adhered to it.[3] This article will review the "per se" doctrine as it has developed since that article.[4]

Kisling clearly held that violation of the rules of the road (and traffic ordinances) now contained in Chapter 321 of the IOWA CODE, without legal excuse, constituted negligence per se as distinguished from prima facie evidence of negligence.[5] The legal excuses which the Court considered would excuse such violations were listed as follows:

1. Anything that would make it impossible to comply with the statute or ordinance.

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[1] 214 Iowa 911, 243 N.W. 552 (1932).

[2] For other comments and articles dealing with the same subject or related areas, see Note, *Liability for Entrusting an Automobile to a Known Incompetent*, 4 DRAKE L. REV. 98 (1955); Note, *The Care Required of a Jaywalker*, 5 DRAKE L. REV. 35 (1955); Note, *Intersection Accidents in Iowa*, 10 DRAKE L. REV. 111 (1961); *Editorial Notes*, 10 DRAKE L. REV. 82 (1960); 12 DRAKE L. REV. 162 (1963). See also, Note, *Iowa Standard of Speed Statute*, 19 IOWA L. REV. 580 (1934); Note, *Judicial Administration: Presumption in the Law of Iowa*, 20 IOWA L. REV. 147 (1934); Cartwright, *Negligence Per Se and the Law of the Road*, 21 IOWA L. REV., Bar Ass'n. Sec. 58 (1936); Note, *Liability for Harm Caused by Livestock*, 34 IOWA L. REV. 318 (1949); Note, *Automobile Tort Law in Iowa, an Examination and Proposal*, 35 IOWA L. REV. 468 (1950).

[3] See, *e.g.*, Kroblin Refrigerated X Press, Inc. v. Ledvina, 127 N.W. 2d 133 (Iowa 1964) (driver found negligent as a matter of law for violating statute prohibiting passing within 100 feet of intersection); Coulthard v. Keenan, 122 N.W.2d 597 (Iowa 1964) (failure to keep proper lookout); Pickney v. Watkinson, 254 Iowa 144, 116 N.W.2d 258 (1962) (stopping on road to pick up passengers); Kohler v. Sheffert, 250 Iowa 899, 96 N.W.2d 911 (1959) (operating motor vehicle with defective brakes); Wachter v. McCuen, 250 Iowa 829, 96 N.W.2d 597 (1959) (passing to right). See also Chicago, R.I. & P. Ry. v. Breckenridge, 333 F.2d 990 (8th Cir. 1964) (failure to stop at railroad crossing contrary to statute).

[4] Per se, when used in reference to violation of a statute, means that violation of a statutory rule of the road is negligence as a matter of law and calls for a binding instruction to this effect. Prima facie, when used in reference to violation of a statute, means that violation of a statute is only evidence of negligence upon which the jury may base its findings if it so desires.

Instruction 4.7 of the IOWA UNIFORM JURY INSTRUCTIONS provides as follows: "By 'prima facie evidence of negligence' is meant a permissible presumption of negligence, which, however, is not conclusive, but subject to being rebutted or explained. In the absence of contrary negligence, it will support a finding of negligence."

See also 3 AM. JUR., PLEADING AND PRACTICE FORMS, § 3:253 which provides as follows: "The jury is instructed that the violation, if you find there was such a violation, of a statute governing the operation of motor vehicles is negligence as a matter of law." [negligence per se]

See also Ritchie v. Schaefer, 254 Iowa 1107, 1109, 120 N.W.2d 444, 446 (1963). "Webster's Dictionary defines 'per se' as 'By, of, or in itself.' 'Prima facie' is defined 'evidence sufficient in law to raise a presumption of fact in question, unless rebutted.' "

[5] "In other words . . . where the statute or ordinance has fixed a standard of care, the failure to observe such standard is negligence, and when in the trial of a case—the other elements being proven—it is shown that the defendant failed to observe the standard of care thus fixed, a case is made for the jury in the first instance." 214 Iowa 911, 915, 243 N.W. 552, 554 (1932).

2. Anything over which the driver has no control which places his car in a position contrary to the provisions of the statute or ordinance.
3. Where the driver of the car is confronted by an emergency not of his own making and by reason thereof he fails to obey the statute, and
4. Where a statute specifically provides an excuse or exception.[6]

The Court has always treated these excuses as exclusive,[7] and therefore, unless the violator can somehow establish one of the excuses, his statutory violations will be treated as negligence, despite the fact that he was otherwise exercising due care[8] or even that he acted as a reasonable man would have under the circumstances.[9] Thus, evidence of ". . . due care . . . does not furnish an excuse or justification for the negligence presumed to arise on proof of the violation . . ."[10] of the statute, unless such evidence will support the existence of one of the legal excuses. Consequently, when the evidence has failed to disclose the existence of one of the excuses, the violator has often been found negligent as a matter of law.[11] As will later be shown, with this finding comes the almost automatic finding that such negligence proximately caused or contributed to the accident.[12]

The first two excuses are seemingly related, and have been discussed and applied on only one occasion since 1959.[13] In *Silvia v. Pennock,* the presence of snow banks on the plaintiff's side of the street made it impossible to comply with the statute requiring her to yield one half of the traveled roadway to oncoming traffic. Plaintiff collided with a car going in the opposite direction. The Court, in approving an instruction to the jury on the first excuse, interpreted the phrase "impossible to comply" as meaning "not reasonably practicable under the circumstances."[15] There was no discussion of

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[6] *Id.* at 916, 243 N.W. at 554.

[7] See *e.g.* McMaster v. Hutchins, 120 N.W.2d 509 (Iowa 1963) (". . . violation of . . . rules of the road may be justified only by showing one of the four recognized legal excuses therefore."); Silvia v. Pennock, 253 Iowa 779, 787, 113 N.W.2d 749, 952 (1962). See Note, *Effect of Statutory Violations in Automobile Negligence Actions in Iowa,* 8 DRAKE L. REV. 110 (1959), at 117, 118.

[8] See Chicago, R. I. & P. Ry. v. Breckenridge, 333 F.2d 990 (8th Cir. 1964); Wachter v. McCuen, 250 Iowa 820, 96 N.W.2d 597 (1959)

[9] *Ibid.*

[10] Chicago, R. I. & P. Ry. v. Breckenridge, *supra,* at 995.

[11] See, *e.g.,* cases cited at note 8 supra; see also Coulthard v. Keenan, 122 N.W.2d 597 (Iowa 1964).

[12] See *infra,* at 65-67.

[13] There are no other states which use the four excuses listed in Kisling. In fact, the term "legal excuse" is seldom found in cases from other states, and then only to describe a justification for a violation of a statute. The words "legal excuse" are words of art as used by the Iowa Court, and consequently, the decisions from other states are not helpful in finding their meaning.

[14] 253 Iowa 779, 113 N.W.2d 749 (1962).

[15] *Id.* at 784, 113 N.W.2d at 752-753. The Court went on to state as follows: "We have held several times that 'impossible' as used in this connection, should not be given a narrow literal construction but it means 'not reasonably practicable. [citing cases] We see no reason why 'impossible', as used in defining the first legal excuse for violation of a statute, should not be given a like meaning. Indeed, we have held the definition of legal excuse in Kisling v. Thierman . . . [to be] . . . very broad and comprehensive in its scope." *Id.* This case, therefore, seems to adopt a reasonable man standard, which the Court has often held not to be sufficient grounds to excuse a violation of statute. See, *e.g.,* cases cited at footnote 8, *supra.*

See also Paulsen v. Mitchell, 252 Iowa 65, 105 N.W.2d 603 (1960) where "impossibility" was asserted but rejected.

the second excuse which would also seem to apply to this situation.[16] It has seldom been applied, however, and is apparently designed to excuse a violation of a statute which occurs where the party to the action has done nothing. An example of this would be the case where vandals have moved a car from its lawful parking place to the middle of the street,[17] or where a prior collision has placed the car in a position which is contrary to statute.[18] The third excuse, the familiar "emergency doctrine", has frequently been applied[19] and denied.[20] The fourth excuse, unlike the others because an apparent violation is "excused" by the traffic code itself,[21] is infrequently used and is perhaps unnecessary.[22]

EXCEPTIONS TO KISLING

The Court, in *Kisling*, recognized that ". . . where an accident occurs outside cities and towns, the fact that the vehicle is on the wrong side of the road is only prima facie evidence of negligence . . .",[23] basing this exception to the per se rule ordinarily applied to violations of rules of the road, on the historical and well settled interpretation of what is now Section 321.298 of the IOWA CODE.[24] This exception, which has been adhered to, created an anamolous situation, since Section 321.297[25] which applies only to cities and towns, had been interpreted to mean that when a vehicle is on the wrong side of the road in a town, such fact constitutes a violation of this section and is considered negligence per se.[26] In 1964, the Court decided *France v.*

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16 If it was impossible for the plaintiff to comply with the statute it is hard to see how the plaintiff could be said to have control of the situation. If the plaintiff was to drive at all he had to drive on the left-hand side of the street in violation of statute.

17 See Note, 8 DRAKE L. REV. 110 (1959), at 119.

18 Obviously, if the collision was without fault of the driver, the second excuse would apply. It could also be said that under such circumstances it would be impossible for the driver to comply with the statute.

19 See, *e.g.*, Mathews v. Beyer, 254 Iowa 52, 116 N.W.2d 477 (1963) (leading driver suddenly decreased speed without signal); Harris v. Clark, 251 Iowa 807, 103 N.W.2d 215 (1960) (defendant struck rear of plaintiff's vehicle when plaintiff failed to signal his intention to stop). See also Jenkins v. Bierschenk, 333 F.2d 421 (8th Cir. 1964).

20 See, *e.g.*, Winter v. Moore, 121 N.W.2d 83 (Iowa 1963) (emergency created by driver invoking emergency doctrine); Chicago, R. I. & P. Ry. v. Breckenridge, 333 F.2d 990 (8th Cir. 1964) (plaintiff held guilty of creating emergency).

21 8 DRAKE L. REV. 110 (1959), at 122. Cf. IOWA CODE §§ 321.354, 321.355 (1962). See also Pickney v. Watkinson, 254 Iowa 144, 116 N.W.2d 258 (1963); Mundy v. Olds, 252 Iowa 888, 109 N.W.2d 241 (1961).

22 If the statute, itself, contains an exception, there is no violation of statute upon which to predicate negligence. *But see* France v. Benter, 128 N.W.2d 268 (Iowa 1964).

23 214 Iowa 914, 243 N.W. 553 (1932).

24 "The general theory of this court in relation to this statute has been that on such highways, the driver of a vehicle has the right to use any part of the road he sees fit, except when meeting another vehicle, when he is required to give one half of the traveled way by turning to the right. In pursuance of this thought, this court has consistently held that the fact that vehicle is traveling on the wrong side of the road is only prima facie evidence of negligence.

". . . it is therefore the law that where an accident occurs outside of cities and towns the fact that the vehicle is on the wrong side of the road is only prima facie evidence of negligence." *Id.*

The section cited above provides as follows: ". . . motor vehicles, meeting each other on the public highway shall give one half of the traveled way thereof by turning to the right."

25 "The operator of a motor vehicle, in cities and towns, shall at all times travel on the right-hand side of the center of the street."

26 McMaster v. Hutchins, 120 N.W.2d 513 (Iowa 1963). See also IOWA UNIFORM JURY INSTRUCTION 4.8.

Benter,[27] in which the "passing" rule in cities and towns was apparently changed, thus making the first material departure from *Kisling* in the thirty-two years since that case had been decided.

The plaintiff, in *France*, while attempting to pass the defendant in a town, collided with the defendant who was making a left hand turn in front of plaintiff's car. It was clear that the plaintiff had commenced to pass before the defendant began his turn. The trial court found in plaintiff's favor despite Section 321.297 which expressly provides that a driver shall always remain on the right hand side of the road in town. The Court, in affirming, held that Section 321.297 did not apply. The Court distinguished several prior cases holding that violation of this section was negligence per se since in those cases there had always been oncoming traffic whereas in this case there was none.[28] The Court then recognized the illogical result of considering driving on the left of the road outside towns prima facie evidence of negligence while the same act in town was considered negligence per se.[29] The Court concluded that the section could not be read literally and in fact had to be read in connection with the other "passing" sections of the traffic code.[30] When read with these sections, it was obvious that the act of passing was permissible under the circumstances.

The opinion in *France* failed to settle the question of whether or not violations of Section 321.297 are hereafter to be treated as prima facie evidence of negligence. The language of the opinion pointedly omits this answer, and in fact the case takes care to point out that the result arrived at by the Court is not, ". . . in fact, an exception" to *Kisling*.[31] If the Court means that passing on the left side in towns is now permitted and does not constitute a violation of Section 321.297, then the statute has little vitality left, and a sizeable body of case law no longer is applicable.[32] If the Court means that hereafter a violation of the statute's clear and unambiguous terms constitutes only prima facie evidence of negligence, the Court has indeed, departed from *Kisling*.[33] Under either interpretation of the holding in

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[27] 128 N.W.2d 268 (Iowa 1964).

[28] The Court indicated that Silvia v. Pennock, 253 Iowa 779, 113 N.W.2d 749 (1962), Rusch v. Hoffman, 223 Iowa 895, 274 N.W. 96 (1937), and Winter v. Davis, 217 Iowa 424, 251 N.W. 770 (1933) "taken literally . . . uphold the defendant's position." *Id.* at 272. In all of these cases there was oncoming traffic involved.

However, in Dakovich v. City of Des Moines, 241 Iowa 703, 42 N.W.2d 511 (1950) the driver was held to be guilty of prima facie evidence of negligence when she was driving over the center line and collided with a street obstruction. The Court in *France*, indicated that they had inadvertently "overlooked" *Kisling* in deciding *Dakovich*. *Id.* at 274.

[29] *Id.* at 272.

[30] *Id.* at 273. See IOWA CODE § 321.299 (1962) (overtaking a vehicle); IOWA CODE § 321.303 (1962) (limitations on overtaking on the left), and IOWA CODE § 321.304 (1962) (prohibited passing).

[31] "The 'exception' we have made in this case is not in fact an exception . . ." *Id.* at 274.

It is difficult, indeed, to follow the Court's reasoning in support of this conclusion.

[32] See dissenting opinion of Justice Moore, *id.* at 275.

[33] Compare Wachter v. McCuen, 250 Iowa 820, 96 N.W.2d 597 (1959). In that case plaintiff was held guilty of contributory negligence as a matter of law when she passed on the right in violation of statute a truck which was traveling on the left side of the road in violation of a statute.

The Court could have more easily, and with less confusion, based its decision on the fourth legal excuse of *Kisling*. Does not the statute, as interpreted by the Court, specifically provide an exception?

France, a finding of an "exception" to the statute to relieve a literal violator of the per se doctrine must now be added to the heretofore four exclusive legal excuses of *Kisling*.

The Court in two other recent cases has further limited the doctrine of *Kisling*. In *Ritchie v. Schaefer*[34] and *Lattner v. Immaculate Conception Church*,[35] the Court expressly limited *Kisling* to violations of rules of the road. In *Ritchie*, an owner of a steer who permitted it to run at large in violation of statute was guilty of only prima facie negligence for the violation when the steer was struck by an automobile; in *Lattner* the defendant church was prima facie negligent when plaintiff fell through a door opening inward in violation of a fire regulation. Although it was not clear under the prior holdings of the Court whether or not the doctrine of *Kisling v. Thierman*[36] was confined solely to violations of rules of the road or to all statutes,[37] the Court had held previously that violations of non rules of the road statutes did constitute negligence per se. *Ritchie* and *Lattner* have apparently settled this question, and thus can be said to have created an additional exception to *Kisling*.[38]

PLEADING AND BURDEN OF PROOF

In the last five years the Court has not changed its position that the party seeking to be excused from a violation of a statutory rule of the road need not plead one of the legal excuses set forth in *Kisling*,[39] but may instead present evidence of that excuse under a denial of negligence.[40]

The Court has also consistently indicated that unless the party seeking to invoke the doctrine of legal excuse presents some evidence tending to establish an excuse, the court will, as a matter of law, find that he was negligent because of the violation of the applicable statute.[41] From this premise, it is

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34 254 Iowa 1107, 120 N.W.2d 444 (1963).

35 121 N.W.2d 639 (Iowa 1963).

36 214 Iowa 911, 243 N.W. 552 (1932).

37 See Note, 8 DRAKE L. REV. 110 (1959), at 115, 116.

38 These two cases pose an additional problem. Clearly in *Lattner* and arguably in *Ritchie* the statute violated was not intended to protect the class of persons of which plaintiff was a member nor was the injury that resulted one of the type to be prevented. The traditional view of treating a statutory violation as either negligence or evidence of negligence has historically required that plaintiff be a member of the class intended to be protected by the enactment and that his injury be of the type intended to be prevented. Although the Court in *Lattner* recognized the existence of this requirement in other jurisdictions it rejected these requirements in Iowa with the terse statement ". . . we are cited to no Iowa decision which holds to this view and our cases are to the contrary." Lattner v. Immaculate Conception Church, 121 N.W.2d 639, at 641 (Iowa 1963). See also Note, 8 DRAKE L. REV. 110 (1959), at 115-116.

It is unlikely that the requirement rejected in Lattner will create any problem with the motor vehicle statutes since such statutes have ordinarily been interpreted to protect all citizens. See, *e.g.*, Hardwick v. Bublitz, 254 Iowa 1253, 119 N.W.2d 886 (1963).

39 Silvia v. Pennock, 253 Iowa 779, 785, 113 N.W.2d 749, 752 (1962).

40 *Cf.* Jenkins v. Bierschenk, 333 F.2d 421, 424 (8th Cir. 1964) (". . . The plaintiff had the burden of proof as to the negligent of the defendants and as to proximate cause; that this did not mean . . . that the plaintiff did not have to prove no emergency existed which would operate as a legal excuse for the defendants.")

41 See, *e.g.*, Sanford v. Nesbit, 234 Iowa 14, 11 N.W.2d 695 (1943); Townsend v. Armstrong, 220 Iowa 296, 260 N.W. 217 (1935). See also DeWeese v. Iowa Transit Lines, 218 Iowa 1327, 256 N.W. 428 (1935).

clear that the party seeking to invoke the doctrine of legal excuse has the burden of going forward with the evidence.[42] It was not clear, however, who had the burden of proving the existence of a legal excuse,[43] although the Uniform Jury Instructions,[44] and the cases cited in their support,[45] seemingly, indicated that the burden was imposed upon the plaintiff.[46] In *McMaster v. Hutchins*,[47] the Court dealt with this problem. McMaster was a passenger in a car when it collided with defendant's automobile which was being driven to the left of the center line in violation of Section 321-297.[48] The trial court instructed the jury in conformance with the Iowa Uniform Jury Instructions 5.7 as follows:

> In the absense of evidence of legal excuse, proof of the violation of a statutory law of the road is sufficient to establish negligence, but if there is evidence of legal excuse, the burden remains upon the plaintiff to prove by a preponderance of the evidence that the statutory violation, if any, was not excused.[49]

The Court reluctantly disapproved of this instruction and held that it was defendant's duty to prove by a preponderance of the evidence one of the four legal excuses of *Kisling*. The Court indicated that ". . . the general rule is that the burden of proof rests upon the party who has the affirmative of the issue, as determined by the pleadings. . . ."[50] pointing out that the defendant here had expressly pleaded the existence of an excuse, unlike the cases cited in support of the Uniform Jury Instructions.

If the Court now intends a party who wishes to invoke the doctrine of legal excuse to plead it, the previous case law to the contrary has been overruled.[51] If the party who pleads legal excuse is required to prove it, while the party who raises it under a denial of negligence, may simply introduce evidence as to the existence of the excuse and obtain the Uniform Jury Instructions that plaintiff has the burden of proving the existence of the excuse, and instead of narrowing the issues of a law suit, such as the pleading rules are intended to do,[52] the true issues are likely to remain concealed. A

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[42] See cases cited at footnote 40, *supra*.

[43] See Note, 8 DRAKE L. REV. 110 (1959), at 122-126, and cases there collected.

[44] IOWA UNIFORM JURY INSTRUCTION 5.7.

[45] *E.g.*, McKeever v. Batchelder, 219 Iowa 93, 257 N.W. 567 (1934); Rich v. Henry, 222 Iowa 465, 269 N.W. 489 (1936).

[46] Logically, the burden would always rest upon the plaintiff. In the case where the plaintiff is claiming that the defendant is negligent because of the violation of a statute, plaintiff is required to prove the existence of negligence by a preponderance of the evidence. *Cf.* Sanford v. Nesbit, 234 Iowa 14, 11 N.W.2d 695 (1943). Since the plaintiff is required to prove his freedom from contributory negligence, the burden of proof would remain upon the plaintiff in a case where the defendant invoked plaintiff's violation of statute as proof of negligence.

[47] 120 N.W.2d 509 (Iowa 1963).

[48] *McMaster* was decided in March, 1963 prior to the decision in France v. Benter, 128 N.W.2d 268 (Iowa 1964). The Court, in the 13 months between these decisions, apparently changed its view in respect to this section of the statute, although in *McMaster* plaintiff's driver collided with an oncoming car.

[49] 120 N.W.2d at 511.

[50] *Id.* at 513, citing McKeever v. Batchelder, 219 Iowa 93, 257 N.W. 567 (1934).

[51] See cases cited, *supra*, footnote 41.

The reason for the prior holdings of the Court seems to be that a denial of negligence could raise the issue of legal excuse since proof of legal excuse merely negated the existence of negligence.

[52] See generally, IOWA RULES OF CIV. PROC. 67, 68, 69, 70, 72 and 73. See also, Loth, *Forms of Pleadings Under the Rules of Civil Procedure*, 29 IOWA L. REV. 23 (1943).

better interpretation of the Court's language is simply the recognition that legal excuse is an affirmative defense to not only be proved by the defendant but also to be pleaded by him under the applicable RULES OF CIVIL PROCEDURE.[53]

As a second reason for its decision in *McMaster*, the Court indicated that the cases cited in support of the Uniform Jury Instructions involved violations which were considered merely prima facie evidence of negligence.[54] In such cases, the Court reasoned, it was unjust to impose the burden of proving the use of due care upon the defendant, since this, in effect, would shift the burden of proof of negligence from the plaintiff to the defendant. However, in cases where violation of the statute was considered negligence per se, the Court believed that the burden on the defendant was justified, since only by proof of the existence of legal excuse, could such violation be justified.[55] Apparently, therefore, the burden of proving negligence remains upon the plaintiff when the statute violated by the defendant is prima facie evidence of negligence, but the defendant is required to prove the existence of legal excuse when the violation of the statute is considered negligence per se.[56]

Despite the problems raised by *McMaster*, the case is a clear holding that in per se statutory violations, the burden of proving legal excuse is upon the defendant when he is charged with a violation of the statute. However, the burden of proving the existence of negligence remains upon the plaintiff when the violation of the statute is considered merely prima facie evidence of negligence. Since *France v. Benter*,[57] it is unclear whether or not any rule of the road is safe from the "judicial exception" of declaring a violation of a statute prima facie or per se evidence of negligence, and consequently it is also unclear as to who will have the burden of proof. A defendant who is charged with a violation of statute is well advised, for this reason, to plead and prove the existence of a legal excuse, even though the statute invoked may later be held to be only prima facie evidence of negligence.[58]

PROXIMATE CAUSE

During the past five years Iowa has not deviated from the view that violation of a statute must be the proximate cause of the accident before the defendant can be held liable, and plaintiff cannot be contributorily negligent unless the violation is in some manner contributed to the accident.[59] This rule has been consistently recognized by the recent cases and is also recognized by the Uniform Jury Instructions,[60] although these instructions have

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[53] IOWA RULE OF CIV. PROC. 103 provides that "Every defense in bar or abatement . . . shall be made in the answer or reply . . ." See also IOWA RULE OF CIV. PROC. 72.

[54] Rich v. Henry, 222 Iowa 465, 269 N.W. 489 (1936).

[55] 120 N.W.2d at 513.

[56] The IOWA UNIFORM JURY INSTRUCTION actually given in *McMaster*, however, should not be used in a prima facie case, since the language indicates that if the violation is shown to exist and is not excused, it is negligence.

[57] 128 N.W.2d 268 (Iowa 1964).

[58] Cf. Jones v. Goodlove, 334 F.2d 90 (8th Cir. 1964).

[59] See, *e.g.*, Ness v. H. M. Iltis Lumber Co., 128 N.W.2d 237 (Iowa 1964); Silvia v. Pennock, 253 Iowa 779, 113 N.W.2nd 749 (1962). See also Note, 8 DRAKE L. REV. 110 (1959), at 114-115 and cases therein cited.

[60] See IOWA UNIFORM JURY INSTRUCTION 2.8.

been held erroneous in one case.[61] The Supreme Court has never, however, clearly formulated what it means by the terms "proximate cause" or "contributing cause" in the case where negligence has been inferred because of violation of the statute. As a result some confusion has arisen, and more is likely to arise.

The holding that a violation of the statute is negligence is a holding, merely, that all drivers upon the roads have a duty to obey the statute, which is breached when the statute is disobeyed. The "reasonable man" standard of care is not used, since all drivers are expected to obey the statute. Although the court permits violations to be excused by a proper showing, this showing amounts to nothing more nor less than that under the circumstances either the violator owed no duty to the injured party to obey the statute, or did not in fact violate it. Thus, when harm results to the plaintiff by defendant's violation of a Sunday law, the holding that such violation is not the proximate cause of the plaintiff's injuries is merely a recognition that defendant owed no duty to plaintiff and therefore was not negligent in violating the statute.[62] Again, an owner of an automobile who operates it without a license is not negligent because he operates it on the streets in violation of statute since he owes no duty to the injured party.[63] The question of causation ought, therefore, have nothing to do with the concept of negligence inferred because of a violation of a statute.[64] The Supreme Court, however, in several recent cases, has inferred the existence of proximate cause because of the violation of statute.

In *Wachter v. McCuen*,[65] plaintiff, while attempting to pass a truck traveling on the left hand side of the road in violation of statute, collided with the truck when it turned back into the right hand lane. In passing to the right under the circumstances, the plaintiff was also violating a statute. The Court held that plaintiff was contributorily negligent as a matter of law and further that such negligence was a contributing cause to the accident. The Court reasoned that had not plaintiff been violating the law, he would not have been passing to the right and there would not have been any accident.[66] This same type of reasoning can be used in any case where one of the parties has violated a traffic regulation; thus in the case where defendant have violated a speed statute, the violation may be properly considered not only as negligence but also as the proximate cause of the accident since if the statute had been obeyed, the violator would not have been at the scene of the accident.[67] Although, the decision in this case is probably justifiable on the facts, since the violation of the statute by the plaintiff was a substantial and contributing cause to the accident, the opinion, which seems to adopt an entirely new concept of proximate cause,[68] may lead to later confusion.

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[61] Ness v. H. M. Iltis Lumber Co., 128 N.W.2d 237 (Iowa 1964).
[62] Compare Tingle v. Chicago, B. & Q. Ry. 60 Iowa 333, 14 N.W. 320 (1882), with Hansen v. Kemmish, 201 Iowa 1008, 208 N.W. 277 (1926).
[63] Ruckman v. Cudahy Packing Co., 230 Iowa 1144, 300 N.W. 320 (1941).
[64] See generally, PROSSER, TORTS, § 47, at 252-254 (2d ed. 1955).
[65] 250 Iowa 820, 96 N.W.2d 597 (1959).
[66] *Id.* at 826, 96 N.W.2d at 602.
[67] *But see* Waldman v. Sanders Motor Co., 214 Iowa 1139, 243 N.W. 555 (1932), and McIntyre v. O. B. West Co., 225 Iowa 739, 281 N.W. 353 (1939).
[68] See, *e.g.*, Osborn v. VanDike, 113 Iowa 557, 85 N.W. 785 (1901) and cases cited

Another application of the "proximate cause" approach in solving a question of liability for violation of a statute arose in *Hardwick v. Bublitz*.[69] The plaintiff Hardwick was a guest passenger in a car driven by the fifteen year old son of defendant. The son had no drivers license which fact was known by the defendant. Plaintiff alleged a cause of action arising under the guest statute and also alleged that the father was negligent in entrusting the vehicle to an incompetent driver in violation of statute. The Court held that the father might properly be held liable, despite the fact that the only showing of incompetence was that the son was operating the car without a license in violation of statute, and that the father had violated a statute by permitting a person thus "incompetent" to drive. Although the Court recognized that the father's violation of the statute would not, in and of itself, be a proximate cause of the accident, the Court reasoned that when the son's negligence in operating the automobile concurred with the father's negligence in entrusting the car to an incompetent, the son's negligent operation of the auto formed the casual link between the father's violation of statute and liability.[70] The father's argument that he should be permitted to show that his son was an experienced driver was disposed of by the holding that the statute itself made the driver incompetent by virture of his age.[71]

Seemingly, the Court would arrive at the same result if the driver of the automobile was highly competent in the driving sense, even though, because of some transitory defect, he was not permitted by law to operate a vehicle on the Iowa highways.[72] The proximate cause of the accident, therefore, is the fact that the driver would not have been on the highways if the defendant had obeyed the statute. It would be more accurate to say that the proximate cause of the accident was the inexperience of the driver or his ability to properly handle the car because of his youth. The causal link to the father is knowledge of such experience. By deciding that violation of the statute is negligence per se, and refusing the defendant the opportunity to show the real cause of the accident, the Court, has in effect, adopted an entirely new concept of proximate cause. The new principle can be stated as follows: in any case in which a violation of a statute is shown, such violation will be considered to be the proximate or contributing cause of the accident if the violator would not have been at the scene of the accident if he had obeyed the statute.[73]

The *Hardwick* case is also difficult to reconcile with the previous holdings of the Court that violation of the "no drivers license" statute is not actionable negligence.[74]

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in footnote 67, *supra*. See also Ness v. H. M. Iltis Lumber Co., 128 N.W.2d 237 (Iowa 1964).

[69] 254 Iowa 1253, 119 N.W.2d 469 (1963).

[70] *Id.* at 1266, 119 N.W.2d at 476.

[71] *Ibid.*

[72] If the party charged with permitting the incompetent to drive is not permitted to show the experience of the driver, this result must follow.

[73] "But here we have the negligence established as a matter of law by the violation of a statute; and under the circumstances the fact that it contributed to plaintiff's injuries is not debatable. If he had not been passing on the right, he would not have been struck; it was his violation of the statute that placed him in the position that resulted in his injury." Wachter v. McCuen, 250 Iowa 820, 826, 96 N.W.2d 602 (1959).

[74] See, *e.g.*, Ruckman v. Cudahy Packing Co., 230 Iowa 1144, 300 N.W. 320 (1941).

CONCLUSION

The most significant developments during the last five years concerning the Iowa doctrine that statutory violations constitute negligence per se appear to be: 1) the judicial limitation of the doctrine to cases involving statutory rules of the road—violations of all other statutes apparently being prima facie evidence of negligence, and 2) the judicial exception to *Kisling v. Thierman* created by *France v. Benter,* which exception may or may not be utilized to declare other apparent violations of rules of road a judicial exception to a particular statute involved.

The Court has also settled the question of who has the burden of proof to prove the existence of a legal excuse, although the language of the Court in arriving at this conclusion gives rise to additional problems and may tend to confuse the once clearly settled question of pleading with respect to raising the issue of legal excuse.

The Court has also seemed to reject the "but for" rule of proximate cause, adopting, instead, a rule that a violation of a rule of the road shall be considered the proximate cause of an accident if it places the vehicle or violator in the place where the accident occurs. This rule has not been enuciated clearly and seems related to only those cases which involve statutory violations.

If the value of the per se rule is, as the Court suggested in *Kisling,* to present a clear guide to litigants, lawyers and judges in the trial of negligence actions, a re-examination of the per se doctrine is now necessary. The guide lines are not clear. They have become confused with judicial interpretations of the rules of the road based upon unanticipated policy grounds, and a growing recognition that negligence cases must be dealt with and decided on a case to case basis. Such a re-examination can only occur by rejecting the per se doctrine entirely or by legislative review.

JOHN L. KIENER (JUNE 1965)

In Hardwick the Court indicated that it did not disagree with the above case but since the violation of statute involved, was in permitting an incompetent to drive, the case was not in point. 254 Iowa at 1267, 119 N.W.2d at 476.

Although the same statute may not be involved, the same issue exists in both cases; the driver would not be at the place of the accident if he were not driving the automobile in violation of statute.