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CIVIL LIABILITY CREATED BY CRIMINAL LEGISLATION

By CHARLES L. B. LOWNDES*

PROFESSIONAL pride, coupled with an instinctive antagonism toward legislation, leads the common law lawyer to visualize a tort as the special creation of the common law. But a tort may originate in an act of the legislature or subordinate legislative body.[1] If the statute or ordinance is explicit about civil liability, there is no great difficulty apart from the ever-present problem in its application to a border-line case.[2] But a perplexing situation is created by those enactments which, while expressly providing only for a criminal action, are found to entail certain civil consequences as well. Specifically, there is great confusion in connection with penal statutes or ordinances whose violation is held to create a civil liability directly, or to do so indirectly on the subtler theory that their violation is negligence per se or evidence of negligence.[3]

There are two problems which are not always clearly distinguished: the statute must be construed; and the construed statute must be fitted into the framework of the common law.

Construction involves an intelligent and discriminating judgment upon the specific facts and circumstances of the individual

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[1]Familiar examples are statutes providing for workmen's compensation, abolishing the fellow servant rule, recognizing a right of privacy, creating various business torts, and imposing extraordinary liabilities upon the owners of automobiles.

[2]An interesting illustration of the difficulty inherent in applying a statute to a close case is Katz v. Wolff & Reinheimer, Inc., (1927) 129 Misc. Rep. 384, 221 N. Y. S. 476. A New York statute provided that the owner of an automobile should be liable for negligent injuries resulting from the operation of his car, if it was driven with his "consent." The driver of one of the defendant's taxicabs became ill and without the defendant's knowledge procured X to drive the cab for him. X negligently ran into the plaintiff. The court held that X's driving the cab was not unauthorized, and that the owner of the cab was, therefore, liable under the statute.

[3]See Thayer, Public Wrong and Private Action, (1914) 27 Harv. L. Rev. 317, Selected Essays on the Law of Torts 276; Davis, The Plaintiff's Illegal Action as a Defense, (1905) 18 Harv. L. Rev. 505; Schneider, Negligence by Violation of Law, (1931) 11 Boston Univ. L. Rev. 217; Notes and Comments: (1918) 18 Col. L. Rev. 603; (1928) 28 Col. L. Rev. 984; (1902) 15 Harv. L. Rev. 225; (1915) 28 Harv. L. Rev. 111; (1928) 41 Harv. L. Rev. 541; (1928) 27 Mich. L. Rev. 116; (1924) 72 U. Pa. L. Rev. 187; (1928) 6 Tex. L. Rev. 398; (1918) 5 Va. L. Rev. 145; (1928) 14 Va. L. Rev. 582.

case. It is poorly adapted to convenient rules of thumb. There are, however, certain more or less clearly defined canons of judicial good manners which may determine the court's approach to the problem and thus mediately condition its conclusions.

Bear in mind that the legal meaning of a statute is not what the legislature intended, nor even what the legislature said. Nor is it what the statute would mean to a lawyer or layman of average intelligence and perception. It is what a competent court says that the statute means. For example, a statute provided for a tax upon the transfer of the net estate of every decedent dying after the passage of the act "to the extent of any interest therein of which the decedent has *at any time* made a transfer, or with respect to which he has created a trust in contemplation of or intended to take effect in possession or enjoyment at or after his death." The legislature or the reader of average perception might suppose that "at any time" means at any time. They would be sadly in error. "At any time" means at any time after the passage of the taxing act. True, nothing in the statute itself indicates such meaning. But this is what the Supreme Court of the United States said that it meant.[4] Individual interpretation may be a congenial doctrine in theology, but it has no standing before the law. What a statute means is determined by an official interpreter,—by a competent court speaking ex cathedra.

A court may construe a statute which expressly provides only for a criminal liability to create a civil obligation as well. It may find that the statute creates a crime expressly and a tort by implication. In a good many cases courts have *given* this meaning to criminal enactments. It is, perhaps, more conventional to say that courts have *found* this meaning in the statute, but the exact character of the judicial process by which this is achieved is expressed less fictitiously by *given* than *found*.

By confining our definition of legislative power to the enactments of a legislature, it is quite possible to reach the conclusion that courts have no legislative power. But, if we accept as our definition the power to make new law or to change existing law, this is a power which the courts share with the popular assembly. An absolute system of checks and balances, or a complete separation of powers, which such a system presupposes, is easier to conceive in theory than to apply in practice; and, probably, if we are intellectually candid it is impossible to conceive such a system even

[4]Schwab v. Doyle, (1922) 258 U. S. 529, 42 Sup. Ct. 391, 66 L. Ed. 747.

in theory. A perfect system of checks and balances would be tantamount to total governmental paralysis. Somewhere there must be the power of making a final decision—somewhere there must be a residuum of arbitrary authority capable of settling a given question. Under our constitutional system, not as a written code, but as an institutional growth, the arbitrary power of making laws is vested in the courts. The courts have the uncontrolled power of revoking the acts of the legislature and of creating new laws by their mere fiat. Theoretically the power to legislate is in the legislature. The power to adjudicate resides in the courts. But since the power to adjudicate includes the power to legislate, and in their adjudications the courts are answerable to no other department of the government,[5] they have the final and arbitrary power of legislation.

Of course, there is a distinction between what courts do and what courts can do. Most of us could poison our families, but only a few unconventional souls go this far. This is not because we lack the power, however, but because we are restrained by certain conscientious and affectionate scruples, plus, perhaps, an acute consciousness of the consequences which might attend such an endeavor. While the courts have the ability to legislate, they are for the most part continent in exercising this power.

There is an admirable reason for such self restraint. Courts like the legislature represent the community from which they derive their existence. As representatives they are bound to conform to its desires. By providing constitutionally for a separation of powers, the community may have attempted the impossible, but, at least, it has evinced a strong desire that laws should be made by the legislature and construed by the courts. It may be admittedly impossible to make any precise demarcation in practice, but this does not excuse an attempt to conform to such a distinction as far as it is possible to do so. It is difficult to see how a court is justified in creating a new law in a case which can be justly determined without the exercise of this power. When a statute explicitly creates a criminal liability, the court which reads a civil obligation into the enactment is embarking upon a perilous speculation. This does not exceed its power, but it does overstep the decent amenities of judicial conduct.

The court which holds that a criminal statute creates a civil liability does not, of course, come out flatly and say that the legis-

[5]A judge may be impeached by the legislature for misconduct in office, but this does not invalidate his decisions.

lature has been silent upon the subject and therefore it will decide the matter as it sees fit. This may be what the court does, but it is not what it says. Verbally, the court justifies its action by "finding" that the legislature intended to create a civil duty although it did not explicitly state this intention. Such an intention is usually imputed to the legislature where the court decides that the statute was passed for the protection of a class of which the plaintiff is a member.[6] The obvious difficulty with this theory, however, is that even conceding a legislative intention to protect this class it has not evidenced any intention of achieving this protection by the imposition of a civil liability, since the only remedy provided by the statute is a criminal or penal proceeding. A right is simply the ex post facto aspect of a remedy, and it savors of absurdity to impute to the legislature an intention to create a civil liability, where it has manifested no intention of creating a civil remedy.[7]

A pious cant which adds little to clear thinking about the law of torts is the trite jingle that the law will suffer no wrong without a remedy. If this means that the law will suffer no moral wrong without giving a remedy, it is obviously untrue. If it means that the law will suffer no legal wrong without a remedy this is mere

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[6]Thus, in Kelly v. Henry Muhs Co., (1904) 71 N. J. L. 358, 59 Atl. 23, a statute which was part of a general act entitled "A General Act Relating to Factories and Workshops, and the Employment, Safety, Health and Work Hours of Operatives" provided that elevator shafts should not be left unguarded. The defendant neglected to provide proper guards for an elevator shaft on his premises. A fire broke out, and the plaintiff, a fireman who was engaged in putting it out, fell down the shaft and was injured. The court held that the purpose of the statute was to protect employees and that since the plaintiff was not a member of this class, the statute created no liability in his favor. On the other hand, in Parker v. Barnard, (1883) 135 Mass. 116 there was a statute requiring elevators to be guarded whose purpose was stated to be "to provide for the better preservation of life and property in Boston." The plaintiff, a policeman, in the lawful discharge of his duties came upon the defendant's premises and fell down an unguarded shaft. The court held that the statute created a right of action in his favor. The purpose of the legislature was to protect persons lawfully upon the premises and the plaintiff was such a person.

[7]In Parker v. Barnard, (1883) 135 Mass. 116, the court said, however, "As a general rule, where an act is enjoined or forbidden under a statutory penalty, and the failure to do the act enjoined or the doing of the act forbidden has contributed to the injury, the party thus in default is liable therefor to the party injured, notwithstanding he may also be subject to a penalty." This is an extreme statement in an early case which would scarcely be accredited today. It is an interesting illustration, however, of the easy facility with which some courts miss the question of whether the legislature has intended to create a civil liability. In substance the court says that the statute creates a criminal liability and, therefore, it creates a civil liability, as well. The court fails, however, to explain the "therefore," which is the crux of the whole problem.

tautology, since the existence of a legal wrong presupposes a legal remedy. In these cases the court is verbally carrying out the repressed desires of the legislature, but actually giving vent to its own inhibitions. Under the pretense of construing the act of the legislature, the court is writing the statute which it thinks the legislature should have enacted.

But even though a court refuses to construe a statute to create a civil liability, this does not preclude the possibility of the statute having an important bearing upon the liability of a defendant in a civil suit. The court may reach this result in a perfectly legitimate fashion by holding that the violation of the statute is an element of a tort resting upon negligence. The difference between these approaches in a given case may be one of technique rather than result, but there is a good deal to be said in favor of using the proper means to reach a given end.[8]

Here we are faced with the common law creation of negligence. The liability of the defendant is based on common law principles, and the statute has only an indirect bearing. The proposition is that the defendant is liable for his negligent torts, and the violation of the statute becomes an element of negligence.

Unfortunately the courts which favor this technique divide on

[8]Compare the reasoning in these cases: In Evers v. Davis, (1914) 86 N. J. L. 196, 90 Atl. 677, the court said:

"The reason why no civil action can be based upon the statute is because no such action or right of action is given by the statute. The language of the statute is entirely free from ambiguity; it seeks to eliminate a source of danger by the imposition of a penalty. The legislature could if such were its intention have provided also that anyone injured by a breach of the statute should have a remedy by civil action. It has not seen fit to do so and the court has no right to supply such omission. . . . The question then is what is, upon common law principles, the effect of statutes such as the one which we are now considering upon the action of negligence?"

In Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K. B. 832, Atkin, L. J. said:

"I imagine that the rule is this, that where a statute imposes a duty upon an individual the question whether a duty is owed to a person aggrieved by a breach of the statute depends on the intention of the statute as to whether it is intended that a duty shall be owed to the individual as well as the state, or that the duty shall be owed to the state only. That will depend on the construction of the statute as a whole, and the circumstances in which it is made, and one of the circumstances to be taken into consideration is this: Does the statute on the face of it contain a reference to the remedy for the breach of its provisions? If it does, this is prima facie the only remedy. That, however, is not conclusive: one must still look at the intention of the Legislature to be ascertained from the words used and one may come to the conclusion that, although the statute enacts a duty and imposes a penalty for the breach of that duty, the statute may still intend that a duty shall be owed to the person aggrieved." To find from the "words used" an intention to create a civil liability, when the statute ex hypothesi says nothing about a civil liability would seem to be quite a feat.

the question of whether the violation of a criminal statute is negligence per se,[9] or conclusive of negligence, or merely evidence of negligence.[10] At the outset, then, we are confronted with the question of which view is correct, or whether either view is correct, that is, whether the violation of a criminal statute has any bearing at all upon negligence.

Holding that the violation of a criminal statute is negligence per se does not differ substantially from holding that the violation of a criminal statute creates a direct civil liability. True, in this case the court talks negligence rather than construction, and on the former theory may admit certain defenses which would be foreign to the latter;[11] but in both cases the court is creating a direct civil liability based solely upon the violation of the statute.

Negligence is essentially a negative concept. It is the absence of due care, which is defined judicially as the amount of care which a reasonably prudent man would have exercised under cir-

[9]Bott v. Pratt, (1885) 33 Minn. 323, 23 N. W. 257; Osborne v. McMasters, (1889) 40 Minn. 103, 41 N. W. 543; Martin v. Herzog, (1920) 228 N. Y. 164, 126 N. E. 814.

[10]Hanlon v. South Boston Horse Railroad, (1880) 129 Mass. 310; Falk v. Finkelman, (1929) 268 Mass. 524, 168 N. E. 89.

In some jurisdictions, which normally hold that the violation of a criminal enactment is negligence per se, an exception is made in the case of speed laws or legislatively enacted rules of the road, whose violation is held to be merely evidence of negligence. McWright v. Providence Tel. Co., (1925) 47 R. I. 196, 131 Atl. 841; Stevens v. Luther, (1920) 105 Neb. 184, 180 N. W. 87.

A famous anomaly is the Massachusetts doctrine that an unregistered car is a "trespasser upon the highway,"—a holding which virtually amounts to declaring that driving an unregistered car is negligence per se, in spite of the fact that the Massachusetts courts usually take the view that the violation of a penal statute is simply evidence of negligence. See Schneider, Negligence by Violation of Law, (1931) 11 Boston Univ. L. Rev. 217, 221-223. For a discussion of this problem from the point of view of causation, see Armstead v. Lounsberry, (1915) 129 Minn. 34, 151 N. W. 542; Speight v. Simonsen, (1925) 115 Or. 618, 239 Pac. 542; Gilman v. Central Vt. Ry., (1920) 93 Vt. 340, 107 Atl. 122; Chase v. N. Y. Central Rv., (1911) 208 Mass. 137, 94 N. E. 377. City of La Junta v. Dudley, (1927) 82 Colo. 354, 260 Pac. 96 is an interesting decision which holds that a city owes no duty of due care to protect persons driving unregistered cars from injuries due to the dangerous condition of the city streets. In this case the court said that whether the violation of the registration requirements was contributory negligence was not in issue since the car was a trespasser upon the streets to which no duty of due care is owed.

In some states a distinction is made between a statute and an ordinance. It is held that the violation of a statute is negligence per se, while the breach of an ordinance is simply evidence of negligence. See (1928) 14 Va. L. Rev. 591 (Note).

[11]If the action is allowed on the theory that the violation of the statute is negligence per se, the defense of contributory negligence could be urged where such a defense would be immaterial if the defendant's liability were based directly upon the violation of the statute. See Evers v. Davis, (1914) 86 N. J. L. 196, 90 Atl. 677.

cumstances similar to those which confronted the defendant at the time of the injury.[12] Ezra Ripley Thayer argued that the violation of a criminal statute is necessarily negligence because the reasonably prudent man, that ideally legal man, could not violate the law without fatal self-contradiction.[13] It would seem, however, that Thayer erred in vizualizing the reasonably prudent man as a creature whose nature is determined by a court rather than a jury.

It is not uncommon in discussing negligence to say that the court instructs the jury as to what constitutes negligence and the jury determines whether in the particular case the defendant has been negligent. This is, however, a very hazy approximation of the respective functions of court and jury. What more nearly happens is that the court tells the jury that there is a social standard of conduct for unintentional injuries and the jury decides the standard for the case confronting it and the defendant's conformity or lack of conformity thereto.

Consider this more concretely. The issue is whether a given defendant has been negligent in a given case. The court instructs the jury that the defendant has been negligent unless he has exercised the care which a reasonably prudent man would have exercised under similar circumstances. What does the jury do? Theoretically, it measures the defendant's conduct by the yardstick of the reasonably prudent man. Practically, however, this is an impossible feat. There is no more a reasonably prudent man than there is an average man in a world composed solely of individuals. It is manifestly impossible to test the defendant's conduct by the measure of the actions of an individual who does not exist. All that the jury can do, and all that the jury does do, is to decide whether the defendant has or has not conducted himself as the jurors feel that society has the right to require that he should conduct himself. Theoretically, this standard is objective. Actually, it amounts to the subjective judgment of the jurors as to whether under all the facts and circumstances of the case it is proper to "soak" the defendant or to let the plaintiff bear

[12]On the general topic of negligence see a collection of articles in Wilson, Cases on Torts 291. Upon the question of the duty which the defendant must owe the plaintiff to refrain from negligent injury see Palsgraf v. Long Island R. Co., (1928) 248 N. Y. 339, 162 N. E. 99 and Heaven v. Pender, (1883) L. R. 11 Q. B. D. 503.

[13]Thayer, Public Wrong and Private Action, (1914) 27 Harv. L. Rev. 317. Thayer drew a curious distinction between prohibitory and affirmative statutes. The violation of a statutes which prohibits an act was negligence per se.

the loss which has occurred. This is no indictment of the jury. At one time society let people adjust their differences by trial by battle. If at the present time society prefers to have these cases settled by the untutored social judgment of twelve travelling salesmen, or bricklayers, or plumbers, or shopkeepers, or other individuals who lack the intelligence to be disqualified as jurors or the influence to escape this unwelcome task, it is beyond the province of this article to comment upon the fact. But, before we put too much stock in the reasonably prudent man, it is well to see just who this fellow is.

The fallacy in Thayer's argument lies in the fatal assumption that the social standard of conduct in negligence, or the nature of the reasonably prudent man, is defined by the court rather than the jury. Underlying Thayer's whole article is the tacit premise that the court defines what a reasonably prudent man would or would not do, and the jury says that this is what the defendant has or has not done. This is manifestly not so. The social standard of conduct is determined by the jury as well as the defendant's conformity or lack of conformity to this standard. The court does not instruct the jury that in a given case the reasonably prudent man would have done this or that; it simply tells the jury that there is a reasonably prudent man, and it is left to the jurors to say what he would do. In other words, the court does not instruct the jury about this standard at all. It tells the jury that there is such a standard, and part of the accepted province of the triers of the facts is to formulate the standard according to their own notions of justice and policy.

It is amazing that as accurate and brilliant a thinker as Thayer could in the same article take the stand that a court should not construe a criminal statute to create a civil liability directly, and then argue, without apparent sense of contradiction, that the violation of the statute constitutes negligence per se. It seems obvious that if the court really applies the common law principles of negligence to the violation of the statute, as Thayer felt that it should, there is no tenable basis for holding that the violation of the statute constitutes negligence per se, unless we abandon the settled premises about the respective functions of court and jury in a negligence case. In spite of the fact that Thayer pointed out that the reasonably prudent man is a patent fiction, he put rather too much store by this conception. He felt that it followed as an inevitable conclusion from the conception of the reasonably pru-

dent man that the violation of a criminal statute was necessarily negligent. True, the doctrine of the reasonably prudent man is a legal doctrine, but the qualities of this superb individual are not determined by legal rules, but by the social judgment of the jurors. It is beside the point to argue what a reasonably prudent man would or would not do. The actions of the reasonably prudent man cannot predetermine the judgment of the jury. The judgment of the jury determines the actions of the reasonably prudent man. The formulation of the social standard of conduct for unintentional injuries is for the jury, not for the court, and, consequently, it would appear to follow that the jury must determine whether the violation of a criminal statute is or is not negligence.

If a court holds that the violation of a criminal enactment is negligence per se, it is simply taking the roundabout route to the conclusion that the violation of the statute creates a civil liability. This is, perhaps, less arrogant than reaching the same result by construction, but it is also a shade less honest. If the violation of a criminal statute has any bearing on negligence, it is, at most, simply evidence of negligence. The question remains, however, whether it can be fairly said to be even evidence of negligence.

This again depends on what is meant by negligence. If the basic idea behind this doctrine is careless conduct, it may well be questioned whether the violation of a criminal statute has any legitimate bearing upon the question of negligence. Carelessness may be criminal, but does it follow that criminality is careless?

There are several plausible reasons for saying that the violation of a criminal statute is evidence of negligence. It seems arguable that the failure to conform to a statutory course of conduct is careless. If this is arguable, then, it is a fair matter to submit to the judgment of the jurors. Unless the jury are exceptionally discriminating, however, it is very doubtful whether the carelessness of the defendant in failing to conform to the statute will impress them as much as the illegality of his actions As a matter of fact, the jury will be more apt to decide against the defendant because he has violated the law than because of any absence of due care. However, it is not entirely apparent that this is objectionable. The basic idea at the root of negligence is that a defendant should be held for the unintentional consequences of socially undesirable conduct, or conduct which appears to the jury to be socially undesirable. May it not be said that in deter-

mining what is socially undesirable the jury should take into consideration the illegality of the defendant's actions?

Observe, however, that the law does not hold that all careless conduct is negligent. Negligence does not mean that a man must exercise the highest possible degree of care but only due care or reasonable care. By a parity of reasoning, it seems to follow that all illegal conduct is not negligent but only that illegal conduct which the jury feels is so socially undesirable that it should be penalized by a civil as well as a criminal liability.

In this connection an interesting problem arises which is sometimes erroneously treated as a question of causation. Suppose that an ordinance provides that an automobile shall not be parked at a certain corner for longer than a specified period. The defendant leaves his car parked overtime. After the legal parking limit has expired, a fire engine strikes the car, and forces it up onto the sidewalk. The car strikes the plaintiff and injures him. Should the violation of the ordinance have any bearing upon the liability of the defendant?

In this case the court held that the violation of the parking ordinance had no bearing upon the defendant's liability because this was a condition and not a cause of the accident.[14] It is not helpful to talk of conditions and causes in any case,[15] and it is certainly not so here. In the first place, it is apparent that the violation of a statute can never be the cause of an accident or injury. Suppose, for example, a clear case where the breach of the statute has an immediate bearing upon liability. A statute requires poisons

[14]Falk v. Finkelman, (1929) 268 Mass. 524, 168 N. E. 89.

[15]There may be a philosophical distinction between cause and condition, and some courts have attempted to make such a legal differentiation. This seems somewhat futile. If A leaves a pile of gasoline drenched rags beside a railroad right of way, which catch fire from the sparks from B's engine and destroy C's property, A's liability is clearer than B's, which is at least doubtful. But the metaphysician would probably say that A had created a condition and B has caused the injury. There are two reasons why a differentiation between cause and condition are not helpful as a legal doctrine. In the first place, it is exceedingly difficult to formulate a satisfactory criterion by which to distinguish a cause from a condition in a given case. Thus, for example, in Chase v. N. Y. Central Ry., (1911) 208 Mass. 137, 94 N. E. 377, the court held that operating an unregistered vehicle was the cause of an accident, while in Gilman v. Central Vt. Ry., (1920) 93 Vt. 340, 107 Atl. 122, the failure to comply with a registration statute was held to be merely a condition and not a cause of an injury. In the second place, a philosophical condition furnishes as valid a starting point for legal liability as a philosophical cause. If this distinction has any meaning in law, it is that a condition is a cause which has no legal significance, that is, a remote as distinguished from a proximate cause. It seems simpler, however, to speak of remote and proximate causes rather than to add new confusion by introducing the element of conditions.

to be labelled. The defendant in violation of this requirement sells an unlabelled bottle of poison to the plaintiff's intestate, who drinks the poison in ignorance of its character.[16] It is clear that the failure to conform to the statute did not cause the injury. The act which violated the statute caused the injury, not the breach of the enactment itself. Speaking precisely and perhaps somewhat pedantically, what caused the death was the sale of the unlabelled bottle of poison to the plaintiff's intestate. The fact that this was also a violation of a statute forbidding such sales did not affect the result. The plaintiff's intestate would have been just as dead if there had been no statute.

It is evident that the violation of a statute has no causal connection with an injury in any case. What may cause the injury, however, is the act or omission which constitutes the violation. The violation of the statute goes not to causation but to culpability. That is, the breach of the statute does not contribute anything to the result, it merely colors the act or omission to act which produces the result.

As a further illustration, suppose that there is a collision between the plaintiff who is driving a buggy and the defendant who is driving an automobile. The plaintiff, at the time of the collision, was violating a statute which forbade driving after dark without lights. The defendant was violating a statute which required him to keep to the right side of the road when rounding a curve. Excluding the question of the defendant's liability, the court held that if the plaintiff's failure to carry lights did not cause the accident she would not be barred by contributory negligence from maintaining an action against the defendant. The court explained this by saying that the failure to carry lights would not be a cause of the injury if the road were so well lighted that the defendant could have seen the plaintiff just as well without lights as with them.[17] This is a clear case of causation. However, the breach of the statute has no bearing upon any causal relation. The significant factor is that the omission to carry lights, which was the omission which violated the statute, did not contribute to the injury, or, at least, might not have contributed to it. In these cases there may be a pure problem of causation, but the breach of the statute has no bearing upon this problem. The important thing is whether the act or omission to act which transgressed the statute produced the injury. If it did

[16]Osborne v. McMasters, (1889) 40 Minn. 103, 41 N. W. 543.
[17]Martin v. Herzog, (1920) 228 N. Y. 164, 126 N. E. 814.

not, then the violation of the statute has no bearing upon liability. This is not because the violation of the statute lacks a causal connection with the injury. The violation of the statute never has any causal bearing upon an injury. It is because the culpable act, the act or omission which violated the statute, is not a cause of the injury.

It is not particularly profitable to approach this problem from the point of view of causation, for the evident reason that the breach of a criminal statute does not bear upon causation at all, but upon culpability. The only time when causation becomes a factor is when it is manifest that the act or omission which violated the statute did not contribute to the injury. But there it is a lack of any causal connection between the injury and the act, not between the breach of the statute and the injury, which is important.

If the act or omission which violates a criminal statute lacks any causal relation to the injury, it is plain that the breach of the statute has no bearing upon liability. There is, however, a class of cases where the act or omission has a causal connection with the injury but the violation of the statute is nevertheless held to be immaterial. Take, for example, the famous case of *Gorris v. Scott*.[18] A statute required vessels carrying cattle to provide separate pens and footholds. The purpose of this enactment was to prevent contagion among the animals. The defendant failed to equip his ship with the pens and footholds required by the statute, and in a storm the plaintiff's sheep were washed overboard. The sheep would not have been lost if there had been the statutory pens. The court held that the failure to comply with the statute did not create any liability in favor of the plaintiff, since the purpose of the statute was to protect the cattle from disease not the hazards of the seas. *Boronkay v. Robinson*[19] illustrates the same point. A statute required vehicles to park with their right sides toward the curb. The defendant's truck was parked with its left side toward the curb. A chain, with a hook attached to the end of it, hung down from the left side of the truck, and when it started up the hook caught a small boy standing on the curb and fatally injured him. The court held that the violation of the statute had no bearing upon liability.

It is apparent that you cannot explain these cases on principles of causation. The omission to provide the pens caused the injury

[18](1874) L. R. 9 Exch. 125.
[19](1928) 247 N. Y. 365, 160 N. E. 400.

in *Gorris v. Scott*, and parking the truck with the wrong side to the curb caused the injury in *Boronkay v. Robinson*. It is true that you might say that the act or omission, which violated the statute, is a cause of the injury, but that it is not a proximate cause, because the interest which was invaded was not one which was protected by the statute; but this seems a roundabout statement for a proposition which can be stated more plainly without any artificial reliance upon causation.

Starting from the initial premise that the violation of a criminal statute creates a direct civil liability, or, what comes to about the same thing, is negligence per se, there is a natural and easy explanation for cases like *Gorris v. Scott* and *Boronkay v. Robinson*. The effect of these decisions is that the violation of the statute has no bearing on liability for an injury which it is not the purpose of the statute to prevent. To determine what injuries the statute is designed to prevent a scrutiny of the interests which the statute seeks to protect is pertinent. An invasion of one or more of those interests is an injury against which the statute seeks to provide. It is reasonably clear that, if the statute intended to create a direct civil liability or conclusively to define negligence, it must have intended to do this to some purpose. A manifest purpose is to protect the interests which the statute seeks to safeguard. It would seem to follow that no liability is created unless such an interest is invaded. This can be treated as a question of causation. Nearly anything can for that matter. But the real problem seems to be whether an interest protected by the statute has been invaded, rather than any causal relation.[20] This is a question of con-

[20]There are of course cases involving the violation of a criminal enactment which really present a problem in causation. This was true of Martin v. Herzog, (1920) 228 N. Y. 164, 126 N. E. 814, where the failure of the plaintiff to carry lights would not have been a cause of the injury if the road was so well lighted that they would not have made the plaintiff's vehicle more visible. Another case which illustrates this same point is Slater v. T. C. Baker Co., (1927) 261 Mass. 424, 158 N. E. 778. The defendant left his car unlocked in violation of a statute. The car was stolen, and the thief negligently ran into the plaintiff. The court held that the violation of the statute had no bearing upon liability, because the defendant could not be held to foresee the felonious taking of his car, and therefore his act in leaving it unlocked was not a cause of the injury. One may differ from the court's view as to the foreseeability of a felonious act, but this was a clear question of causation.

On the other hand, it would appear that courts frequently try to resolve questions of civil liability for the breach of a criminal enactment by principles of causation where causation is really not in issue at all. For example, there is a conflict as to whether the breach of a statute requiring an operator's license or registration is a proximate cause of an injury which occurs due to the operation of a motor vehicle which is not

struction, and it seems simpler to treat it as such without clouding the issue by talking about legal cause. The real problem is whether an interest safeguarded by the statute has been invaded. If it has, the violation of the statute is relevant. If it has not, the violation of the statute is immaterial as far as a direct liability under the statute is concerned.[21] It must be observed, however, that this approach is only valid on the assumption that the legislature intended to protect these interests by a direct civil liability or, its practical equivalent, by laying down a standard, deviation from which constitutes conclusive evidence of negligence. The interests which the legislature intended to protect, in other words, must be interests which are protected civilly as well as criminally. If the purpose of the statute is simply to protect these interests by a criminal action, the purpose of the statute has no bearing upon civil liability.

The result is that if one starts from what appears to be the

registered, or by an unlicensed operator. See the cases cited supra note 10. The courts which hold that the violation of the statute is not a proximate cause seem to be thinking of the violation of the statute itself rather than the act which violated it. The courts which take the opposite view think of the act of operating the vehicle which indubitably caused the accident and also violated the statute. The result is that it is impossible for these courts to reach any agreement because they are thinking about different things. It seems clear, however, that the violation of the statute cannot be a cause of the injury, while the act which violates the statute certainly is a cause. The solution for these cases then lies not in any doctrine of causation but in an examination of the interests which it is the purpose of the statute to protect. It is true that different courts might feel differently about the interests which the legislature sought to safeguard by passing the statute; that is, some courts might feel that they were designed to safeguard the public interest in revenue, and other courts might take the position that they were intended primarily for the protection of persons using the highway. A proper approach to these problems would not eliminate entirely conflict among the decisions, but it would at least present a clear and intelligent breach.

Much the same thing is true of those decisions which hold that there is no causal connection in an action for malpractice between the violation of a statute requiring a physician to be licensed and the injury to the patient. Brown v. Shyne, (1926) 242 N. Y. 176, 151 N. E. 197; Janssen v. Mudder, (1925) 232 Mich. 183, 205 N. W. 159; and those decisions which take an opposite stand. Whipple v. Grandchamp, (1927) 261 Mass. 40, 158 N. E. 270; Harris v. Graham, (1927) 124 Okla. 196, 255 Pac. 710; or those cases holding that the violation of a Sunday law is not the proximate cause of injuries suffered by Sunday travellers, Sutton v. Town of Wawatosa, (1871) 29 Wis. 21; Baldwin v. Barney, (1879) 12 R. I. 392 and those courts which hold to the contrary. Smith v. Boston & M. Ry., (1876) 120 Mass. 490; Cf. Johnson v. Irasburgh, (1874) 47 Vt. 28.

[21]It is immaterial as far as the creation of a direct statutory liability or a liability based on regarding the breach of the statute as negligence per se is concerned, although it will be argued later that it may have an indirect bearing upon the defendant's common law liability as evidence of negligence.

more analytically correct position, that the violation of a criminal statute is merely evidence of negligence, cases like *Gorris v. Scott* and *Boronkay v. Robinson* present a more perplexing problem. The underlying assumption here is that the statute does not create any civil obligation or afford civil protection against the injuries which it is designed to prevent, because the legislature has not manifested any intention to create a civil remedy for such injuries. The effect of the statute here is to show culpability—to color an act or omission which caused the injury. The interest which is invaded derives its protection from the common law, not from an act of the legislature. It would seem that the defendant might be equally culpable, that is, his conduct might be just as anti-social, in a case where he has inflicted an injury which the statute was not designed to prevent as where he has caused an injury against which the legislature sought to provide.[22]

It is difficult to see any satisfactory basis for limiting the effect of the statute as mere evidence of negligence to a case where the interest which is infringed is one which the statute was designed to protect. If the liability of the defendant is predicated upon the violation of the statute, then the interests protected by the statute are important in delimiting the scope of statutory liability. But, if the defendant is to be held on common law principles of negligence, the violation of the statute is pertinent not as a

[22]In Boronkay v. Robinson, (1928) 247 N. Y. 365, 160 N. E. 400 the court seemed to feel that if the violation of a statute was not negligence per se, it would not be even evidence of negligence. Cardozo, Ch. J. said:

"The death of the plaintiff's intestate may have been due to negligence on the part of the defendant in failing to observe that the chain was in a position where it might strike a person on the curb, but the rule as to the manner in which vehicles must proceed and stop created no safeguard against such a danger and disobedience of that rule was not the cause of the plaintiff's intestate's death. If that was due to any negligence on the part of the defendant, it was negligence which had no connection with the duty imposed by statute or ordinance."

The court seems obviously correct in holding that the violation of the statute was not negligence per se, because the injury was not one which the statute was designed to prevent. Its use of the word cause is unfortunate, since the act which violated the statute certainly caused the injury. Conceding, however, that the purpose of the statute was not to prevent this type of injury, and that its breach, therefore, affords no basis for holding that the defendant was negligent per se, it is not equally apparent that the violation of the statute should not be considered as an element of culpability,—as evidence of negligence.

Compare, in this connection, the cases which have held that the violation of a statute may be evidence of negligence although the plaintiff is not one of the class for whose benefit the statute was designed. Hanson v. Kemmish, (1926) 201 Iowa 1008, 208 N. W. 277; Dohm v. Cardozo, (1925) 165 Minn. 193, 206 N. W. 377.

definition of the interests protected, but as an element of culpability. It is difficult to see how the purpose for which the statute was passed can affect the question of culpability.

In this connection, it is important to remember, however, that if the act or omission which constitutes the breach of the statute has no causal relation to the injury, the violation of the statute should not even be evidence of negligence. The breach of the statutory enactment simply shows that the act or omission was to some extent culpable, but even a culpable act is not a starting point for liability unless it is related to the injury.

Conclusion

The creation of civil liability by the breach of a criminal enactment is a perplexing problem. To say that the statute imposes a direct civil liability is not beyond the power of the court, but this type of construction has a tendency to usurp the function of the legislature.

Perhaps, the weight of authority (if this is material) takes the view that the violation of a criminal statute is conclusively negligent. The difficulty with this approach is that it is only a roundabout and disingenuous statement of the proposition that the violation of the statute creates a civil liability. As soon as a court says that anything is negligence per se, the question of negligence is eliminated. The defendant's liability is based upon the failure to comply with an absolute rule of law rather than a social standard of conduct created by the jury for that particular case. It is true that a liability predicated upon an act which is negligence per se may be more readily defeasible than a liability which is based directly upon the violation of the statute, but the fact remains that the liability is created in both cases not by the failure to measure up to any standard, but by the breach of a definite legal rule.

The alternatives are that the violation of the criminal statute has no bearing at all upon the civil liability of the defendant, or that it is merely an element of culpability to be considered by the jury in determining negligence. As an original question, the proposition that the violation of a criminal statute has no bearing on negligence is not entirely unappealing. However, while it is clear that there is no intrinsic relation between criminal conduct and careless conduct, the violation of any enactment is probably sufficiently anti-social to warrant the consideration of a jury in

formulating the social standard of conduct in a case involving an unintentional injury.

Starting with the premise that the violation of a criminal statute is simply evidence of negligence raises a difficult question where the injury which occurs is one which the statute was not designed to prevent. But, since the relevance of the statute in this case is to color the defendant's act or omission, rather than to define the interests which are to be protected by the action, it seems a fair conclusion that even here the violation of the statute may be considered by the jury as evidence pertinent to their decision as to the standard of conduct which society is entitled to exact from the defendant and his compliance or failure to comply with that standard.