Breach of Statute as the Basis of Responsibility in the Civil Law*

HAROLD NEWMAN
Montreal

I. *Scope of the Question*

The question to which we are to address ourselves may be stated thus: In the Civil law, when and to what extent does failure to perform a statutory duty constitute ground for a claim in damages against the one who fails to carry out such duty, by a person who sustains damage as a result of such failure?

We must immediately distinguish, and define terms:

Civil law. It is not intended to cover all or many of the legal systems based upon the Napoleonic Code and the earlier French and Roman law. In the main, attention will be devoted to the law of the Province of Quebec, with such reference to the law of France and the Roman law as will help to clarify the Quebec law.

Statutory duty. This will be taken to mean a duty either to do something or to abstain from doing something, such duty being imposed by a statute legally enacted by a competent legislative authority. Also considered will be regulations and by-laws passed in virtue of power given by such statutes, and incidentally by-laws and regulations of minor authorities such as counties, municipalities, etc. However, the terms "statute" and "statutory duty" will, unless otherwise mentioned, be used in their ordinary, literal sense.

A person who sustains damage. It is elementary that only a person who suffers damage can claim compensation from the violator of the statutory duty. The nature of the damage will not be gone into, since it falls rather into the field of responsibility in general than into the specific field of responsibility for violation of statutory duty.

As a result of such failure. As will be seen,[1] a causal relation

* The prize-winning essay in the 1949 Essay Competition of the Canadian Bar Association.

[1] *Infra*, p. 784.

must exist between the breach of statute and the damage suffered. For the purpose of fixing the scope of the question, it is assumed that unless there is such a causal relation, there is no responsibility.

II. *General Observations*

In discussing the question asked at the beginning of this essay, comparison will be made with the Common Law in an endeavour to determine to what extent the two systems agree on this subject and wherein they differ. In particular, attention will be given to the laws of the rest of Canada, with some reference to decisions of courts in Great Britain and in the United States.

Where a subject matter does not fall specifically into the field of our inquiry as stated, no attempt will be made to deal with it. Thus, such a matter as contributory negligence will be excluded, since the rules relating to it are identical regardless of whether the breach of duty which occasioned the damages related to a statutory duty or a common-law duty. For the same reason, such matters as vicarious liability, damages, common fault, common employment, proximate cause, prescription and all other subjects not related to breach of statute as distinguished from breach of duty in general will be disregarded.

Some statutes specifically state that a contravention thereof will justify a claim in damages against the violator, if damage results. An example was the Ontario Highway Traffic Act, which said "The owner of a motor vehicle shall be responsible for any violation of this act . . .". This has been held to make the owner absolutely liable, short of an act of God.[2] Another example of such a law is to be found in article 555 of the Quebec Municipal Code: "Quiconque cause un embarras ou une nuisance sur les chemins . . . ou en rend l'usage incommode ou dangereux, encourt, pour chaque infraction, en sus des dommages occasionés, une amende de . . .". Such statutes carry their own answer to the query we are trying to answer, and will require no comment. Our inquiry will be confined to statutes which do not specifically provide for civil responsibility in case of breach.

III. *The Civil Law of Responsibility*

The law of responsibility in the Province of Quebec, in so far as it concerns our inquiry, is stated in two articles of the Civil Code of Quebec:

[2] *Hull* v. *Toronto Guelph Express Co.*, [1929] 1 D.L.R. 375.

Article 1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

Article 1054. He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things he has under his care; . . . [Article 1054 goes on to give instances of persons under control, but the above part of the article is all that is required for the present purpose.]

The Civil Code of France, in articles 1382, 1383 and 1384, lays down rules which are identical in effect with the two Quebec articles, although differing in wording.

Under both codes, in order for responsibility to exist, there must be "fault" on the part of the person against whom the claim is made (or on the part of the person under his control), and the "fault" must be the cause of the damage complained of.

In what must this "fault" consist? The dispositions of the two codes have a common, ancient and honourable ancestry. They go back to the Lex Aquilia of the Roman law, which speaks of "injuria" as being "quod non jure factum est, hoc est contra jus".[3]

Planiol in his *Droit Civil* says: "La faute est un manquement à une obligation pre-existante, dont la loi ordonne la réparation quand il a causé un dommage à autrui".[4]

Beullac, in his recently-published and valuable work, *La Responsabilité Civile dans le Droit de la Province de Québec*, says: "En principe l'acte illicite, c'est-à-dire qui viole une loi ou des règlements ayant force de loi, constitue une faute qui, si elle a causé préjudice à autrui, engage la responsabilité de son auteur".[5] He adds, "Il ne faut pas oublier en effet que la responsabilité civile est régie par les articles du Code Civil, que les lois particulières comportent généralement une sanction au cas d'inobservation, et que cette sanction s'ajoute mais ne remplace ni déplace, à moins d'un texte contraire, les dispositions du Code".

Sourdat says: "Il y a faute de négligence toutes les fois qu'un dommage est arrivé soit par l'absence d'une précaution imposée à quelqu'un, soit par la loi ou les règlements de l'autorité, soit. . ."[6]

Demolombe: "Les circonstances que nous avons signalées sont caractéristiques du délit et du quasi-délit; la faute, l'imprudence, la négligence, la maladresse, l'inobservation des règlements."[7]

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[3] ff. Ad Legem Aquiliam, Lib. 9, Tit. 2, L. 5, Sec. 1.
[4] (7th ed.), Vol. 2, No. 863.
[5] Chapter 4, Sec. 2, p. 12.
[6] Responsabilité, No. 668.
[7] Vol. 31, No. 480.

Aubry et Rau: "Toutefois une personne qui, par quelqu' omission, a occasioné un dommage à autrui, n'est pas responsable qu'autant qu'une disposition de la loi lui imposait l'obligation d'accomplir le fait omis".[8]

Bosc: "La victime n'a rien à prouver contre leur auteur au point de vue du caractère illicite. Ce caractère découle du fait que l'acte est interdit par la loi pénale. Il est évident que pas plus au point de vue civil qu'au point de vue pénal, on n'a le droit de faire ce que la loi interdit, et le particulier lésé par un crime est légitimement fondé à obtenir réparation du tort qu'il a subi, comme la société du trouble dont elle souffre.

"*Inobservation d'un règlement.* Un règlement légalement promulgué constitue une loi pour ceux qu'il vise et s'impose d'une façon absolue à leur observation. S'ils y contreviennent, ils peuvent être punis de peines plus ou moins fortes. Aussi dirons-nous que, si de cette inobservation résulte un préjudice pour quelqu'un, ce préjudice devra être réparé par celui qui a contrevenu au règlement. Ici encore, l'acte est illicite en soi, parce qu'il a été accompli en violation d'une sorte de loi, et il suffit à la victime d'établir le caractère obligatoire du règlement et de prouver que s'il eût été observé, le préjudice eût été évité."[9]

All this seems crystal clear. The Code says that if you are guilty of fault ("faute" in the French version) you owe reparation. Fault is the failure to carry out an obligation imposed upon you by law. Planiol[10] explains that the obligation may be imposed by a specific law, or it may be the ancient obligation which he considers to have formed part of the civil law since Roman times and still to be inherent in it, namely the obligation not to be imprudent, neglectful or lacking in skill: "La loi nous défend réellement d'être maladroits, comme elle nous défend d'être malhonnêtes; la loi Aquilia est historiquement la source de cette obligation générale, dont aucune législation ne peut répudier l'héritage". (Our article 1053 C.C. obviously does not repudiate its heritage.)

However, we need consider here only the first category mentioned by Planiol, namely, obligations imposed by a specific law. As stated by him and by the other authors just cited, failure to perform these obligations is "fault". No room seems to be left for distinctions or arguments as to legislative intent (other than those to be found in the wording of the statute imposing the

[8] Vol. 4, sec. 444.
[9] Essai sur les Eléments Constitutifs du Délit 66, 72, cited by Thayer (1914), 27 Harv. L. Rev. at p. 328, note.
[10] Traité Elémentaire de Droit Civil (7th ed.), Vol. 2, No. 863bis.

duty). If you fail to carry out a duty imposed by a statute, you are at fault, and will owe reparation for damage done just as in the case of any other fault, and with the same provisoes (*e.g.* the damage must result from the fault).

Let us, then, state experimentally our answer, under Quebec law, to the question posed at the beginning of this article:

> *Anyone capable of discerning right from wrong who fails to perform a duty imposed on him by statute, whether to do something or refrain from doing something, is guilty of fault and owes to a person to whom damage is caused by such fault, reparation in the same manner and to the same extent as in the case of any other fault.*

This answer will be subject to revision as we examine the jurisprudence of the Quebec courts and determine whether, in actual practice, our answer covers all contingencies.

IV. *The Jurisprudence: Preliminary Considerations*

Despite the apparent simplicity and clarity of the law, the courts, as will be seen, have introduced into their judgments many considerations which seem to be at variance therewith and which seem to be inspired, for the most part, by rules imported from the Common law, and not belonging to the Civil law at all.

On this point of applying common-law decisions to Quebec cases much has been said. In the recent case of *Drapeau* v. *Gagné*,[11] the Court of Appeal reversed the judgment of the lower court, which had dismissed the action on the ground that the plaintiff had been a mere "licensee" (basing itself on the judgment in the English case of *Addie & Sons* v. *Dumbreck*[12]). In reversing the judgment of the lower court, some of the judges of the Court of Appeal took occasion to point out that such classifications as "invitee", "licensee" and "trespasser" form no part of the civil law of responsibility, but have been improperly imported into the jurisprudence of Quebec from the Common law. Mr. Justice Barclay, of the Court of Appeal, points to a recent case in which he had previously made that point[13] and refers to two cases decided by the Supreme Court of Canada[14] which pointed out the "danger of treating English decisions as authorities in Quebec cases which do not depend upon doctrines derived from the

[11] [1945] K.B. 303 (Que. Ct. of Appeal).
[12] [1929] A.C. 358.
[13] *Morin* v. *Neron*, [1945] K.B. 625 (Que. Ct. of Appeal).
[14] *Halle* v. *Can. Indemnity Co.*, [1937] S.C.R. 368; *Desrosiers* v. *The King* (1920), 60 S.C.R. 105, at p. 119.

English law". Clearly, article 1053 C.C. was not derived from the English law.

This point was also discussed by Mr. Justice Langelier in his excellent series of lectures published under the name of "Cours de Droit Civil de la Province de Québec", where he says, "On est dans l'habitude de citer constamment devant les tribunaux des ouvrages anglais sur ces matières [delicts and quasi-delicts]. Je vous ferai remarquer que c'est le droit français qui est notre droit sur ce sujet. Les livres anglais ou américains, et les décisions rendues par les tribunaux anglais ou américains n'ont donc chez nous qu'une autorité de raison." [15]

Lest it be thought that this point is being over-elaborated, it must be pointed out that it is basic to our inquiry, for two reasons:

(a) In seeking the law of Quebec on this or any other point, we are not limited by the doctrine of *stare decisis*, but are at liberty to go to the written law and its sources, regardless of what has been said of the law by the courts in applying it to specific cases. Naturally, the decisions of our courts are accorded the highest respect, and cited as precedents in interpreting the law, but the courts have no legislative powers, and no matter how many decisions, contradictory or concordant, have been rendered on any point, the law itself remains unaltered. It is true that for practical purposes it may be impossible, after a consistent series of judgments interpreting the law in a certain way, to convince a court that such interpretation is wrong, and that the law is other than that which the courts have declared it to be. The point, however, is that it is quite legitimate to make the effort, and to seek to establish a variance between the law itself and what the courts have declared the law to be.

(b) We are therefore at liberty, when we find that a Quebec case has been decided upon the authority of judgments based on the Common law, to point out that the decision in the Quebec case was not based on Quebec law and is therefore open to question. (We are, further, at liberty to point out that a judgment was based upon a misconception of the Quebec law, when such is the case.)

V. *The Jurisprudence (Civil Law)*

In a case decided quite recently, Mr. Justice Tyndale (now A.J.C.) discussed the question of a violation of statutory duty as affecting civil reponsibility. This was the case of *Jones* v. *Pain Su-*

[15] P. 461, under article 1053.

[16] [1943] S.C. 330 (Que. Superior Ct.). This case will be referred to again.

prême Ltée.,[16] which had to do with a violation of section 4, chapter 20 of the By-laws of the City of Montreal. This section provides that "any and all persons . . . instigating or engaging any apprentice or servant to abandon such service shall be liable to a fine or penalty . . . and imprisonment . . .".

The learned judge said, "Where a statute or by-law purports to regulate the conduct of citizens with regard to each other, the contravention thereof must be considered as constituting a fault, the by-law in question is *not* a mere police regulation".

He also said, "There is important authority for the proposition that the contravention of a statutory provision does not necessarily constitute *per se* a civil fault (*e.g. Volkert* v. *Diamond Truck Co. Ltd.*;[17] Pollock on Torts.[18] A contrary view, however, seems to be held by some at least of the modern French authors (e.g. Sourdat;[19] Mazeaud[20])."

Sourdat, at the place cited by the learned judge, says, "A cet égard, il est évident que la qualification des actes humains par la loi est ici décisive, en ce sens que toute infraction à la loi pénale que chacun est tenu de connaître et de respecter, quelle que soit sa gravité en morale et dans le for intérieur, constitue une faute, qui motive suffisament une demande de dommages intérêts".

(It is to be noted that at Common law, too, a similar dictum has been laid down by very eminent authority. In the leading case of *Martin* v. *Herzog*[21] the late Justice Cardozo, who was then a member of the New York State Court of Appeals, was called upon to decide whether the failure to provide a buggy with lights on the highway, as called for by the Highway Law, was negligence. Mr. Justice Cardozo, in his judgment, said: "We think the unexcused omission of the statutory signals is more than some evidence of negligence. It *is* negligence in itself.... There may be times, when if jural niceties are to be observed, the two wrongs, negligence and breach of statutory duty, must be kept distinct in speech and thought.[22] . . . In the conditions here present, they come together and coalesce. A less rigid rule has been applied where the one who complains of the omission is not a member of the class for whose protection the safeguard is designed. . . . Some relaxation there has also been where the safeguard is prescribed by local ordinance, and not by statute....

[17] [1939] K.B. 385, affirmed [1940] S.C.R. 455.
[18] (13th ed., 1929), pp. 25-27.
[19] Traité de la Responsabilité (5th ed., 1902), Vol. 1, No. 14, p. 7.
[20] Traité de la Resp. Civile (3rd ed., 1938), Vol. 1, No. 416, p. 473.
[21] (1920), 228 N.Y. 164 (N.Y. State Ct. of Appeals).
[22] Pollock, Torts (10th ed.), p. 458; Salmond, Jurisprudence (5th ed.), pp. 351, 363.

An ordinance, however, like a statute is a law within its sphere of operation, and so the distinction has not escaped criticism [authorities]".

But now to consider the case referred to by Mr. Justice Tyndale for the contrary doctrine, namely that contravention of a statutory duty does not necessarily constitute *per se* a civil fault. This is the case of *Volkert* v. *Diamond Truck Co. Ltd.*[23] In this case, it was decided that "the mere fact of leaving an unprotected truck with its key in the switch on the highway, thus permitting an employee of the owner to use it without authorization and while he was not in the performance of the work for which he was employed, does not render such owner responsible for an accident causing injuries to a passerby through the negligence of such driver".

The holding can readily be supported on the basis that there was not a direct relation of cause and effect between the violation and the damage. However, Mr. Justice Hall says in his notes, "there is not a scintilla of evidence to support the contention that it was negligent to leave the truck on the street.... It was left ... only for half or three quarters of an hour ..." (he seems to imply that the violation of the statute was not negligence or "fault"). He then cites section 54 of the Motor Vehicles Act, "Nothing contained in this act shall be interpreted as limiting or diminishing the right of any person to take civil proceedings for damages", and he adds, "The general rule is that a civil liability is not imposed upon the owner if, without a statutable obligation, he would not have been liable".

This latter statement is difficult to understand. It seems to say that where a statute imposes a duty on someone, he will not be at fault if he neglects to carry out the duty, unless he would equally have been at fault under article 1053 C.C. if the statute had not been enacted. Interpreted in this way, the statement would seem to be at variance with the Code, as well as with the doctrine and the jurisprudence. It may be that the learned judge was interpreting section 54 of the Motor Vehicles Act rather than laying down a general principle; however, the section does not seem to lend itself to this interpretation.

Mr. Justice St. Jacques, in the same case, cites section 31 of the Motor Vehicles Act: "Every motor vehicle shall be provided with a lock or other device to prevent such vehicle from being set in motion. When a motor vehicle is left unattended on a public highway, it shall be locked or made fast in such manner

[23] [1939] K.B. 385 (Que. Ct. of Appeals).

that it cannot be set in motion." He adds, "Cette disposition se rapporte certainement à l'obligation du propriétaire de ce véhicule de le garder soigneusement; mais elle ne comporte aucune sanction, et ne formule pas de responsabilité qui en découle. N'est-ce pas alors suivant les règles du droit commun que la responsabilité doit être déterminée?" This also seems to lay down the rule that if the statute does not declare the owner liable in damages, his failure to perform the required duty will not be a fault entitling the injured party to damages.

The judgment of the Court of Appeal was confirmed on appeal to the Supreme Court of Canada.[24] Duff C.J. applied the following principle: "*Prima facie* in view of the sanction by penalty, the owner of a motor vehicle guilty of an offence under Section 31 by reason of which another person suffers harm is not responsible in a civil action". This statement is presumably good Common law, but it is respectfully submitted that it is not good Civil law.[25]

It would seem that the decision of Chief Justice Sir François Lemieux in the similar case of *Blais* v. *Lortie*[26] is more in conformity with the principles of Civil law. This case likewise concerned the failure to lock a car as required by the provincial law, but it differed from the *Volkert* case in that in the latter there actually was a lock, while in the former there was not even a lock into which a key could be put. However, from the point of view of the present essay, this difference is not important. What is important is the statement of the law by the learned judge: "La loi fait donc un devoir, une obligation au propriétaire d'un véhicule moteur de le munir d'une fermeture à clef. . . . [Le défendeur a] commis une infraction à la loi qui constitue un fait illicite et un quasi-délit civil."

This statement should be set against that of Chief Justice Duff in the *Volkert* case, and it will be seen that they set forth widely divergent doctrines. That of Mr. Justice Duff is good Common law; that of Mr. Justice Lemieux is in conformity with the Civil law as set forth in the Code and in the authors on the Civil law.

It is to be noted that Mr. Justice Rinfret, in the Supreme Court judgment in the *Volkert* case, likewise spoke of "police regulation" and points out that the sanction is the penalty provided by the Act, there being no intention to attach a civil pen-

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[24] *Volkert v. Diamond Truck Co.*, [1940] S.C.R. 455.
[25] See p. 785 *supra*.
[26] (1923), 63 S.C. 53 (Que Superior Court).

alty. The same comment may be made on this as on the statement of Duff C.J. in the same case.[27]

An early case on the point we are considering was decided in the Supreme Court of Canada on an appeal from Quebec, in 1895. This was the case of *Montreal Rolling Mills* v. *Corcoran*.[28] Here an employee was injured, possibly, although there was no proof, by a machine which had not been provided with guards as called for by regulations passed in virtue of the Quebec Factories Act. The judgment dismissed the action against the employer, and rightly, since the required relation of cause and effect was not established. But Mr. Justice Girouard added: "It is a question remaining yet unsettled whether the breach of a public statutory duty, such as the duty to fence around machinery, gives a right of action to the person damnified by the breach", and he proceeds to cite the dictum of Lord Chelmsford in *Wilson* v. *Merry*:[29]

> The statutable duty is, no doubt, created absolutely for the purposes of the act; but it is a duty which, if unperformed, can only be enforced by the penalty; and this for the protection of the public is to be recovered against the owner or occupier who causes the work to be done. If an individual sustains an injury in consequence of the work being imperfectly or improperly performed, a civil liability is not imposed upon the owner, if without the statutable obligation he would not have been liable.

It would seem that this citation from *Wilson* v. *Merry* is responsible for much of the subsequent confusion in our jurisprudence, since we can recognize in it a great deal of the phraseology we meet again in the *Volkert* case.

It may be mentioned that in subsequent cases involving breach of the same regulations as in the *Corcoran* case, the employer was held at fault, in apparent disregard of the decision in the *Corcoran* case.[30]

The comment of Mr. Justice Langelier on the principle involved in the *Corcoran* case puts the point excellently:[31]

> . . . certaines lois ont permis au Lieutenant-Gouverneur de faire des règlements relativement aux manufacturiers pour assurer la protection des ouvriers [this was before the days of the Workmen's Compensation Acts]. L'inobservation de ces règlements constitue une faute de la part du propriétaire de l'établissement, et si cette faute est la cause d'un

[27] On this point of "police regulation", see *supra*, p. 784, and *infra*, p. 792.
[28] (1896), 26 S.C.R. 595.
[29] L.R. 1 H.L. Sc. 340.
[30] *Bélanger* v. *Desjardins* (1905), 29 S.C. 1; *Desrosiers* v. *St. Lawrence Furniture* (1905), 27 S.C. 73 (Ct. of Review); *Kirks* v. *Canada Paint Co.* (1906), 29 S.C. 500.
[31] Cours de Droit Civil de la P. de Q., art. 1053 C.C., p. 466.

> accident, il en est responsable. Le contraire a été décidé quelquefois, mais les décisions en ce sens n'ont aucune valeur; on les a motivées sur des mots et non pas sur des principes de droit. On s'est contenté de dire qu'il s'agissait de règlements de police. Ceci ne veut rien dire; ces règlements de police ont l'autorité de la loi à tel point que ceux qui les enfreignent encourent une amende. Puisqu'ils entrainent l'obligation de faire quelque chose, l'inobservation de cette obligation constitue une faute.

This, it is submitted, not only is good Civil law, but is a complete refutation of the statement of the law in the *Corcoran* case as well as in the *Volkert* case and others similarly motivated.

Finally, a very recent as well as a complete and authoritative statement of the law is to be found in *Lone* v. *St. André*.[32] In this case, Mr. Justice Bissonnette said:

> Le principe qui a inspiré nos arrêts est devenu constant et il peut se résumer en quelques brèves propositions. La violation d'une ordonnance provinciale ou municipale constitue une faute. Que cette contravention permette à l'autorité publique d'exercer des sanctions, par voie d'amende ou d'emprisonnement, ceci est indeniable. Mais d'autre part, il ne peut être admis que là ou il y a violation d'une disposition réglementaire, il y a nécessairement responsabilité civile. En effet, un règlement municipal ou une disposition réglementaire ne crée pas une responsabilité civile et la contravention à une telle disposition réglementaire ne fait pas en soi encourir une telle responsabilité. Tel que je conçois ce problème, à la lumière de nos arrêts, je dirais que toute violation de règlement est un fait répréhensible qui constitue une faute. Cette faute n'est pas en elle-même génératrice de responsabilité civile, mais s'il existe ou s'il peut s'établir un rapport entre cette faute et le préjudice réel qui en résulte, il y a alors relation de cause à effet et lorsque telle relation est constatée, la responsabilité civile peut en découler.[33]

Accepting this as a statement of our law, and taking it together with the rest of what has been said in this section of our inquiry, we can see no reason to modify the experimental statement made earlier, except perhaps to make it clear that when we speak of "statutory duty" we include a duty imposed by a regulation or by-law having the force of law. This modification will be made in due course.[34]

VI. *The Common Law in Canada and Great Britain*

The Common law will now be briefly considered, with a view to finding points of similarity (or dissimilarity) between the two systems. In investigating the Common law, we shall keep in

[32] [1945] K.B. 164 (Que. Ct. of Appeal).

[33] See to the same effect the dictum of the same judge in the case of *Wray* v. *Broad*, [1944] K.B. 461.

[34] See *infra*, p. 802.

mind the statement of Sir John Salmond: "Just as the criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there a general principle of liability." [35]

The common-law rules on the subject under discussion have a lengthy and respectable lineage, going back to the year 1285. As pointed out by Duff J. (as then he was) in *Orpen* v. *Roberts*,[36] they go back to the Statute of Westminster,[37] which provides:

> So in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.

After this citation, the learned judge continues, "Obviously this leaves it to be determined in each case whether the enactment relied on was passed for the benefit of the person asserting the right to reparation or other relief; and assuming that question to be answered in the affirmative, there may still be the general principle to be considered that, to quote Lord Selborne, L.C., in *Brain* v. *Thomas*[38] 'where a statute creates an offence, and defines particular remedies against the person committing that offence, *prima facie* the party injured can avail himself of the remedies so defined and no other.' But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislature to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty."

Some confusion seems to have been created by the words of Lord Wright in rendering the decision of the Judicial Committee of the Privy Council in the well-known case of *Winnipeg Electric Co.* v. *Geel*.[39] After citing section 15 of the Motor Vehicle Act of Manitoba, which provided that motor vehicles must have adequate brakes, Lord Wright said, "That section, however, is a penal clause involving penalties for its breach under s. 52 of the

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[35] Salmond on the Law of Torts (10th ed., 1945), Ch. 2, sec. 4, p. 15.
[36] [1925] 1 D.L.R. 1101 (Supreme Ct. of Can.).
[37] 13 Ed. I, c. 24, as stated in Comyn's Digest, Vol. 1, p. 442, tit. "Action upon Statute (F)".
[38] (1881), 50 L.J.Q.B. 662, at p. 663.
[39] [1932] 4 D.L.R. 51.

Act, and is not material in a case of civil liability such as the present; it may accordingly be disregarded for the present purpose". Nothing further is said on the subject.

In the later case of *Brown* v. *Bulger*,[40] the Manitoba Court of Appeal considered a breach of the same Act as in the *Geel* case, the violation in this case consisting in not having the motor car's lights on, with the result that it was hit in the rear by another automobile. The court pointed out that this violation, though made an offence by the Act, creates no absolute liability for civil damages, saying that the penal responsibility under the statute does not necessarily mean civil liability at all events. (It was held that a sudden breakdown in the lights of the truck, resulting in a collision with it from the rear before the driver of the truck had a chance to set out flares, was due to unvoidable accident.) It is interesting to note the difference between the holdings in this case and the remarks of Lord Wright in the *Geel* case; the court did not, as suggested by Lord Wright, disregard the provision as being a "penal clause"; on the contrary, the court seems to have declared that penal responsibility brought with it civil responsibility, though not "at all events".

The court, in *Brown* v. *Bulger*, distinguished the case from that of *Hall* v. *Toronto Guelph Express Co.*[41] on the very sound ground that there was a fundamental difference in the statutes under consideration. The Manitoba statute said "the owner of a motor vehicle shall incur the penalties provided in this act . . .", and the Ontario Act said "shall be responsible for any violation of this Act". Clauses similar to that in the Ontario Act have been held, at Common law, to create a civil liability against which only an act of God can be set up as a defence.[42] In other words, the Ontario statute set up an absolute liability regardless of negligence. If the tail-light went out only an instant before the collision, unknown to the driver, he would be liable.[43]

These cases illustrate the difficulty of comparing holdings based on motor vehicle statutes (and on statutes in general), since they vary in their provisions. To compare the various Acts is not within the scope of this article. What we can derive from the judgments is a statement, right or wrong, of principles (as in the *Geel* case) which we can endeavour to apply to the consideration of breach of statute in general.

In a recent case, the High Court of Ontario had before it a

[40] [1938] 4 D.L.R. 708.
[41] [1929] 1 D.L.R. 375 (Ont.).
[42] *Great Western Ry.* v. *"Mostyn"*, [1928] A.C. 57.
[43] *Hall* v. *Toronto Guelph Express Co.* (*supra*).

claim for damages resulting from the death of two persons from fumigating operations carried out by the defendant in an adjoining apartment. The court, per Hogg J., said, "The defendant had a statutory duty imposed upon it to comply with the regulation already referred to, and the damage in respect of which relief is sought was within the mischief against which the regulation was intended to provide".[44]

In 1943 also, the Ontario Court of Appeal, in *Wynant* v. *Welch*,[45] had to consider a collision between an automobile and a horse which was on the highway in violation of a county by-law passed under the authority of the Highway Improvements Act. It was held that the Act did not disclose "an intention to give a right of action to an individual for a breach of the by-law or to make a breach statutory negligence. Moreover, considering the limited authority of municipal corporations, the by-law was not passed for the benefit of a particular class of persons as distinguished from the public at large." Gillanders J. added, "I cannot think that this by-law, and numerous other municipal by-laws, affect the common-law rights of individuals to any greater extent than is necessary to give effect to their clearly expressed provisions, nor that the Legislature intended here to make a breach of such a by-law statutory and actionable negligence. Such intention cannot be read from the legislation and does not expressly or implicitly appear as part of the enactment." The court cited in support of its judgment the case of *Tompkins* v. *Brockville Rink Co.*[46]

Gillanders J.A., in the *Wynant* case, points out that the general rule is stated in *Taylor* v. *Peoples Loan and Savings Corp.*,[47] where Middleton J.A. says:

> Where a supreme legislative authority by its enactment imposes a duty upon any individual to do something for the benefit and protection of a particular class, an action will lie at the instance of any member of the class for an injury which has resulted from the neglect of that duty.
>
> Where a particular penalty is by the statute provided to secure the observance of the statute and as a punishment for the breach of its requirements, this may or may not indicate an intention on the part of the legislature that this liability is to be the sole result of the breach of the requirements of the Act. In each case, the task confronting the Court is to discover the intention of the Legislature.

[44] *Schubert* v. *Sterling Trusts*, [1943] 4 D.L.R. 584.
[45] [1943] 1 D.L.R. 13.
[46] (1899), 31 O.R. 124, quoting *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (1877), 2 Ex. D. 441; also *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402.
[47] [1929] 1 D.L.R. 160, at p. 165.

> It is true that it has been held that regulations made under the authority of a statute may be treated as being part of the statute for the purpose of this inquiry;[48] but I know of no authority indicating that the same principle is applicable to municipal by-laws passed under the general authority of the Municipal Act. . . .

An additional case to illustrate the Common law is *Stromme* v. *Woodward Stores*,[49] in which the British Columbia Supreme Court held, "where a window cleaner fell on the plaintiff from a building, enactments passed for the benefit of window-cleaners are not applicable in an action against the owner of the building".

Two very recent English cases may be mentioned as perhaps indicating the present trend of the British jurisprudence. One is *Grant* v. *Sun Shipping*.[50] In this case, the court held that the breach of an obligation imposed by the Docks Regulations, 1934, to light an uncovered hatch was negligence, and a workman injured by falling into the hatch could recover damages. In the other case, *Clark* v. *Brims*,[51] an automobile at the side of the road was not lighted at the rear as called for by the Road Transport Lighting Act, and plaintiff's car hit it in the darkness. A penalty was imposed for non-compliance. It was held that "the act imposed public duties only and did not in addition impose duties enforceable by any individuals aggrieved. Further, this Act contains reference to a remedy for certain breaches of it . . .". The action was dismissed.

Finally, on this phase, we may mention a recent judgment of the Supreme Court of Canada in a case from British Columbia, *The King* v. *Anderson*.[52] The action was based upon the failure of the defendant's driver to observe certain precautions before changing his course. Mr. Justice Estey said ". . . the operator's servant violated the express provisions of section 3(j) and his conduct in this regard constitutes negligence".

VII. *Common Law in the U.S.A.*

The rules of the Common law as applied in the United States in 1913 are considered in an article by Thayer in the Harvard Law Review.[53] This article has had a profound effect on subsequent American thinking on the subject, and is still frequently cited by writers both in the United States and in Great Britain, for example, Salmond.[54]

[48] *Ross* v. *Rugge-Price* (1876), 1 Ex. D. 269.
[49] [1938] 3 D.L.R. 784.
[50] [1948] 2 All E.R. 238 (H.L.); see also *Jerred* v. *Dent*, [1948] 2 All E.R. 104.
[51] [1947] 1 All E.R. 242 (K.B.D.)
[52] [1946] S.C.R. 129.
[53] Public Wrong and Private Action (1913-4), 27 Harv. L. Rev. 317.
[54] The Law of Torts (10th ed.), p. 507 note.

Thayer divided criminal statutes (meaning statutes providing a penalty for breach) into two classes (a) prohibitory statutes and (b) those setting forth affirmative requirements. As to prohibitory statutes, he says that "breach of statute is more than 'evidence of negligence'; it *is* negligence" (his reasoning, which is most convincing, need not be reproduced here). As to statutes calling for affirmative action, he says that unless the legislator obviously intended to create a civil liability, none will exist. He further points out that where the statute aimed to prevent one type of harm and the violation caused harm of a different sort, the defendant is not liable.[55]

Let us add the dictum of Cardozo J. in the *Herzog* case, above referred to, namely that neglect to carry out a statutory duty is negligence *per se*. The eminent judge, in this judgment, seemed to be pointing the way towards a system free from the many complicated rules of the British jurisprudence, which were inherited by our Canadian Common law.

That the path thus indicated has been followed can be clearly seen if we consult the latest United States digests. Thus, if we read through the "General Digest" of American cases (which covers the entire United States) for 1948 and 1949 under the heading "Negligence",[56] we see from Arizona, Ohio, Pennsylvania, Tennessee, California, Idaho, Indiana, Kentucky, West Virginia and other states holdings all to the same effect: "The violation of a statute is negligence *per se* (but must be the proximate cause of the accident, to charge the defendant with liability)". A California case[57] says that the violation may be shown to have been justifiable or excusable or due to some independent force over which the defendant had no control.

From this brief survey, it would seem that the jurisprudence in the United States is almost completely won over to the doctrine that breach of statute constitutes negligence, regardless of the imposition of a penalty, and that complicated searches into legislative intent are not in order.

VIII. *Comparison of Civil Law and Common Law*

Let it be understood at the outset that the writer is a civilian and does not pretend to a comprehensive knowledge of the Common law. Neither does he propose to express an opinion on what

[55] *Gorris* v. *Scott*, L.R. 9 Ex. 125.

[56] Sub-heading "Requirements of statutes or ordinances", Sec. 1, key No. 6.

[57] *Martin* v. *Nelson*, 187 P. 2nd 78.

the Common law actually is with regard to the subject under discussion, particularly keeping in mind the statement of Salmond:[58] "But in the words of Lord Macnaghten[59] 'whether the general rule is to prevail . . . must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience'. The result is that the law depends upon the interpretation which the Courts may put upon any particular statute, and the consequence is an undesirable uncertainty."

What is proposed to be done is to consider the rules laid down in the various common-law cases, and determine how far they are valid, if at all, in the Civil law.

One may be permitted first to remark that the apparent uncertainty and lack of consistency in the Common law is probably due to the continuous process of law-making by judges and juries which is inherent in the common-law system, and which in turn is dependent upon variations in philosophical outlook at different periods.[60]

In the civil-law system, of course, the same tendency exists on the part of the courts to adapt the law to the times. The result may at times be unfortunate, in that the jurisprudence is saddled with unjustified and unjustifiable decisions intended by well-meaning courts to do better justice to the rival pretensions of the parties than they think would be done by the outright application of the law. However, the law remains, and somehow (let us hope) it prevails. In any case, being statutory law, it is not so elusive, and has the quality of permanence. Of course, if a change becomes necessary, it can be effected by legislative process.[61]

Now let us summarize briefly, for comparison, the rules set forth in the various common-law cases, and see if they have any validity in the Civil law.

(a) *Exclusion of civil responsibility in damages if the statute provides for a penalty.* This rule has no validity in the Civil law; it is contrary to all the doctrine and practically all the jurisprudence. See Beullac,[62] Bosc,[63] also the case of *Globensky* v. *Lukin*.[64]

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[58] *Op. cit.*, p. 509.
[59] *Pasmore* v. *Oswaldtwistle U.D.C.*, [1898] A.C. at p. 397.
[60] See on this point an interesting article by Cecil A. Wright (1948), 26 Can. Bar Rev. 46.
[61] *E.g.* the Workmen's Compensation Act.
[62] La Responsabilité Civile, p. 12, cited *supra* p. 784.
[63] *Supra*, p. 785.
[64] (1862), 6 J. 145 (Que. Ct. of Appeal).
[65] (1910), 17 R.L.n.s. 24 (Que. Ct. of Appeal). To the same effect: *Garon* v. *Anglo Canadian Asbestos Co.* (1893), 3 S.C. 185 (Que. Ct. of Review); *Larouche* v. *Riberdy* (1936), 60 K.B. 451 (Que. Ct. of Appeal).
[66] *Supra*, p. 790.

See also *Laurentide Paper Co.* v. *Batsford.*[65] The point need not be laboured; it is thoroughly clear. (The contrary dictum of Duff C.J. in the *Volkert* case, as previously pointed out,[66] was not based on Civil law, but on Common law.

(b) *The rule that violation of municipal by-laws (as distinguished from statutes) does not create civil liability, unless specifically provided for.* This, likewise, is not good Civil law. See the citation from Bosc already given.[67] To this may be added the many cases in our jurisprudence involving failure to observe municipal by-laws, for example, by omitting to have a light in the rear of a car,[68] also an old case cited by Dalloz,[69] in which the violation of an "arrêté préfectoral" by driving a carriage on the left side of the highway was held to have the same effect as violation of statute, "l'arrêté préfectoral ayant en cette circonstance l'autorité de la loi".

(c) *The rule that a distinction is to be made as to whether the duty is owed to a particular class or to the public as a whole; in the latter case, an individual would have no recourse in damages* (Salmond[70] queries the validity of this dictum, which was affirmed as recently as 1941[71]). In any case, this is not good Civil law. The civil-law rule was well put in the case of *Roy* v. *Blais:* "Chaque fois que des règlements ont, comme dans l'espèce, pour but la sécurité du public ou des employés, ils créent une obligation d'agir, et... toute abstention ou omission devient une faute ..."[72] The civil-law rule was also well stated in *Laurentide Paper Co.* v. *Batsford:*[73] "The by-law in question is part of the public law. It was enacted for the benefit of the public in general. The action states that the appellant failed to comply with the by-law, and such failure was the immediate cause of the accident." (It was held that this was sufficient in law as an allegation of a basis of responsibility.) Further, on this point, may be cited the multitude of cases in which individuals have been awarded damages against municipalities for their failure to carry out their statutory duty to keep sidewalks and roads in a safe condition.[74]

[67] P. 785.

[68] *Larouche* v. *Riberdy* (1936), 60 K.B. 451 (Que. Ct. of Appeal).

[69] Répertoire de Législation (1858), v. Responsabilité No. 188.

[70] The Law of Torts (10th ed., 1945), p. 505.

[71] *London Armoury Co.* v. *Ever Ready Co.*, [1941] 1 K.B. 742. This case seems at variance with *Phillips* v. *Britannia Hygienic Laundry*, [1923] 2 K.B. 832; *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; *David* v. *Britannic Merthyer Coal Co.*, [1909] 2 K.B. 146; and *Monk* v. *Warbey*, [1935] 1 K.B. 75.

[72] (1931), 50 K.B. 164 (Que. Ct. of Appeal). This case concerned a failure to provide guards around machines; the statement of the law is certainly more in accord with the Civil law than that in the *Corcoran* case, *supra* pp. 791-2.

[73] (1910), 17 R.L. n.s. 24 (Que. Ct. of Appeal)..

[74] See Beullac, *op. cit.*, Ch. II, pp. 356 ff.

(d) *The rule that the person claiming must be one of those for whose protection and benefit the statute was passed.*[75] No distinction to this effect is to be found in the authors on the Civil law (as far as the research of the writer has disclosed). The uncompromising terms in which the authors define "faute" as the violation of a statute or regulation do not seem to leave room for investigation into the intent of the legislative body in passing the law. If the statute imposes a duty, the failure to carry it out is fault, regardless of the person intended to be protected, and anyone who can prove that he has been injured thereby can claim damages. Nevertheless, we find in the jurisprudence a curious case which decided that the statutory requirement to provide every motor car with a lock and key and to keep the car locked when left on the street "is a precaution ordered by law in the interest of the owner of the automobile, but not in the interest of third parties".[76] It is submitted that this case was not decided in accordance with the true principles of the Civil law.

(e) *The rule that the injured person cannot claim if the damage suffered by him is not of the kind intended to be guarded against.*[77] The same comment can be made regarding this as in the case of rule (d). Where the statute does not specifically restrict the right of recovery to any one type of damage rather than any other, the general principle of the Civil law will apply, and the injured person will have his claim regardless of the type of damage suffered. While the space available to the writer will not permit of discussing the matter at length, it may be pointed out that the argument of E. R. Thayer, in discussing the case of *Gorris* v. *Scott*,[78] while sound in the light of common-law principles, is by no means convincing when applied to the Civil law.

(f) *The rule that a person who is insane or otherwise incapable of appreciating the nature of his acts is not guilty of negligence.*[79] This rule is sound in Civil law. It is covered by the wording of article 1053 of the Quebec Civil Code: "Every person capable of discerning right from wrong is responsible. . . ".

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[75] In *Stromme* v. *Woodward Stores*, [1938] 3 D.L.R. 784, the British Columbia Supreme Court held, "Where a window-cleaner fell on the plaintiff from a building, enactments passed for the benefit of window-cleaners are not applicable in an action by the plaintiff against the owner of the building" (the action was rejected). See also *Highley* v. *C.P. Ry.*, [1930] 1 D.L.R. 630 and, *contra*, *G.T. Ry.* v. *Anderson* (1898), 28 S.C.R. 541, at p. 550.

[76] *Cohen* v. *Supple* (1922), 29 R.L.n.s. 156 (Que. Superior Ct.).

[77] *Gorris* v. *Scott* (1874), L.R. 9 Ex. 125.

[78] (1914), 27 Harv. Law Rev. at pp. 337-338.

[79] *Buckley* v. *Toronto Transportation Comm.*, [1946] 4 D.L.R. 721, where the driver of a car was under the insane delusion that his car was being operated by remote control. Compare *Gootson* v. *Rex*, [1947] Ex C.R. 514, where a car driver fell to the floor unconscious, and the car hit a pedestrian.

(g) *The rule that "inevitable accident", including happenings due to "act of God" or to the "unforeseeable act of a third party", is a good defence against civil liability.*[80] This rule is valid in Civil law. Planiol and Ripert say: "Principe. Pour prévenir les dommages, la loi et les règlements prescrivent ou interdisent certains actes. Comme ils sont censés connus, le seul fait de leur inobservation constitue une faute dont seul la force majeure ou l'absence de relation causale avec le dommage pourra écarter l'effet."[81]

The authors hold "force majeure" and "cas fortuit" to be identical in meaning.[82] The Civil Code translates "cas fortuit" as "fortuitous event" and, in article 17, par. 24, defines it: "A 'fortuitous event' is one which is unforeseen, and caused by a superior force which it was impossible to resist". The superior force may be a phenomenon of nature, but it must be unforeseeable as well as *impossible to resist* in order to exonerate the person owing the duty.[83] The act of a third party may also constitute a "fortuitous event", for example where a car was forced to abandon the right side of the road by reason of a car which was coming towards him on the wrong side of the road.[84] But being blinded by the lights of an approaching car is not a "fortuitous event", since the driver who is blinded should slow down or stop.[85] (The common-law case of *Jones* v. *Shafer*[86] is apparently an application of this rule. A statute required flares to be put out on the road if a truck broke down on the highway. In this case, the required flares were placed in position, but were later stolen, with the result that an oncoming car hit the truck. It was held that the truck driver was not liable, presumably because he was not negligent; the absence of the flares was due to the act of a third party.)

Our experimental statement of the law[87] must be amended

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[80] Salmond, Law of Torts (10th ed.), Ch. II, Sec. 25, p. 25.

[81] Traité Pratique de Droit Civil Français (1930), Vol. 6, no. 521-"Violation de la Loi et des Règlements". See also Aubry et Rau, t. 4, No. 446; Sourdat, t. 1, No. 645.

[82] See Beullac, *op. cit.*, p. 599.

[83] *Gagné* v. *Corp. de St. Henri de Taillon* (1919), 57 S.C. 105 (Que. Superior Court). In this case, cracks in the ice at an ice-crossing were held not "unforeseeable".

[84] *Vouligny* v. *Savard* (1939), 77 S.C. 317 (Que. Superior Ct.). See also *Tremblay* v. *Ribaud* (1938), 64 K.B. 68 (Que. Ct. of Appeal); *Glens Falls Ins. Co* v. *Guay* (1939), 45 R.L.n.s. 347 (Que. Ct. of Appeal). Cp. Cass. 14 janv. 1851 (S. 52.1.638), where two vessels collided in similar circumstances.

[85] *Beauchesne* v. *Babineau*, [1945] S.C. 166 (Que. Superior Ct.); *Leblanc* v. *Ouellette*, [1948] S.C. 127 (Que. Superior Ct.).

[86] [1948] S.C.R. 166 (Can. Supreme Ct.).

[87] *Supra*, p. 786.

to provide for exoneration in the case of "fortuitous event". This will be done below.

IX. *Further General Observations*

The proposed examination of the civil-law and common-law principles has now been made, and a comparison between them attempted.

It will be obvious that no effort has been made to set forth exhaustively the jurisprudence under either system. Such a course, even if space had permitted, was thought inadvisable, since it would have confused rather than clarified the issue. Rather has the writer attempted to extract the basic legal principles applied in typical cases by the courts under both systems, and, under the Civil law, the true principles of the law as they appear in the Code and in the writings of the commentators.

As stated at the outset, collateral questions have been left severely alone. A great deal might have been said of vicarious liability, and of the quasi-absolute liability imposed by article 1054 C.C. Many cases might have been cited in which liability was held not to exist, despite a breach of statute on the part of the defendant, and this on the ground that there was no causal relation between the breach and the damage. However, consideration of these matters has purposely been omitted, since no principles are involved which are peculiar to the particular *fault* we are considering, namely breach of statute, and not equally applicable to every type of fault.

X. *Conclusion*

In view of all the foregoing, we are now ready to answer the question posed at the very beginning of this article. The following, it is submitted, is the civil-law principle applicable to breach of statute:

> *Anyone capable of discerning right from wrong who fails to perform a duty imposed on him by statute or by a regulation or by-law having the force of law, whether such duty be to do something or to refrain from doing something, is guilty of fault. He owes to a person to whom damage is caused by such fault reparation in the same manner and to the same extent as in the case of any other fault; however, if the failure to perform the duty was caused by a fortuitous event or "force majeure" then the person failing to perform the duty is not guilty of fault, and does not owe reparation.*

XI. *Adequacy of the Civil Law of Responsibility for Breach of Statutory Duty under the Conditions of Modern Society*

As has been shown, civil responsibility for breach of statute is tied to the notion of "fault", which is the basis of responsibility in delictual or tortious liability in general, not only in the Civil law, but in the Common law as well. Without fault, there is no liability; hence, theoretically, if we do away with the requirement of fault, to substitute for it (for example) the "risk" theory, our identification of breach of statute with *fault* becomes meaningless.

However, is this not merely a matter of words? Under such a system as the "risk" system, we would merely have to alter our statement of the law to say that breach of statute is equivalent to the creation of a *risk* for which reparation is due. The fundamental concept of our legal system in respect of liability for violation of statute thus remains equally sound under the *fault* doctrine and under the theory of *risk*.

In any case, it would seem that the Civil law is thoroughly committed to the *fault* theory in preference to that of *risk*. Of interest in this connection is the comment of Planiol, speaking of the new doctrine of "risque créé": "Cette nouvelle doctrine, loin d'être un progrès, constitue un recul, qui nous amène aux temps barbares antérieurs à la loi Aquilia, où l'on s'en tenait à la matérialité des faits. Des règles formulées par cette loi l'idée de faute a été lentement dégagée par les jurisconsultes, à l'aide d'un long travail d'analyse qui serait à recommencer si l'idée simplement du risque l'importait." [88]

That the *risk* doctrine does constitute a return to more primitive times is admitted by the American theoreticians,[89] who, however, lean strongly to this theory as being better adapted to modern conditions, and who rely upon it as the basis of a new general theory of tort to replace the piecemeal treatment of the subject which has prevailed hitherto in the Common law.[90]

Nevertheless in actual practice, the requirement of fault as

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[88] Traité Elémentaire de Droit Civil (7th ed.), no. 863 *ter*.

[89] See article by Seavey, Principles of Torts (1942), 56 Harv. Law Rev. 73; also, Negligence Subjective and Objective, by the same author in (1927), 41 Harv. Law Rev. 1.

[90] See the interesting discussion of this subject in the article by Cecil A. Wright, The Law of Torts: 1923-1947, in (1948), 26 Can. Bar Rev. 46. See also the Restatement of the Law of Torts, the article by Seavey, Mr. Justice Cardozo and the Law of Torts, in (1938-39), 52 Harv. Law Rev. 352, and the judgment of Mr. Justice Cardozo in *Palsgraf* v. *Long Island R.R.* (1928), 248 N.Y. 339.

the basis of responsibility still seems firmly fixed in the jurisprudence in the United States, as has been shown.[91]

In France, it seems that the theory of *risque créé* and the concomitant doctrine of *risque profit* have been pretty generally abandoned, and that the authors (with very few exceptions) support the *faute* system. On this subject the Messrs. Mazaud say: "Il est certain qu'aujourd'hui la thèse du risque a perdu beaucoup de terrain en doctrine. Plusieurs de ceux qui l'avaient défendue, et notamment M. Ripert, reconnaissent la nécessité de revenir à la faute. La grande majorité des auteurs se prononce en ce sens. MM. Josserand, Demogue et Savatier restent presque seuls partisans d'une responsabilité civile sans faute".[92] They add that the jurisprudence is overwhelmingly in favour of the principle of fault.[93]

In the Province of Quebec, the risk theory has never found support.[94]

Perhaps this somewhat lengthy excursus on the subject of the basic theory of responsibility in general is unjustified in view of the narrower scope of the subject under consideration. However, the incorporation in our findings of the *fault* theory in relation to liability for breach of statute seems to make it permissible, at least, to attempt to justify at the same time the total civil-law philosophy of liability for delicts and quasi-delicts, and the narrower doctrine relating to responsibility for breach of statute.

The high moral character of the civil-law doctrine, with its stress on "duty" and the necessity of reparation for damages caused by "illicit" acts or omissions, has been well put by Mr. Antonio Perrault: "Chaque être a le droit d'agir; l'exercice de cette activité peut causer préjudice à autrui; l'obligation de le réparer intervient lorsqu'une faute se rattache à l'exercice de cette activité, faute présumée dans certains cas, faute que, dans d'autres circonstances, il faut alléguer et prouver. Ce système juridique se justifie par une idée hautement morale, la liberté dominée par le bien commun et la justice".[95] This was said of the law of responsibility in general; it is of course applicable to breach of statutory duty specifically.

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[91] *Supra*, p. 797.

[92] Traité Théorique et Pratique de la Responsabilité Civile (2nd ed., 1934), t. 1, at p. 80. See also footnote, in which the authors add, "Encore ces auteurs ne défendent-ils que des théories mixtes, ne rejetant la faute que dans certaines domaines".

[93] *Idem*, p. 84.

[94] See article by J. Emile Billette, Principes Généraux de la Responsabilité Délictuelle et Quasi-Délictuelle dans la Province de Québec (1932-1933), 11 Revue de Droit 265.

[95] (1945), 5 Revue du Barreau at p 493.

If more than morality and justice are required, it can truthfully be said that the Civil law of responsibility for breach of statute is practical and well suited to the times. It can be applied, without any variation, to any statutory duty, whether the statute is one which is thickly covered with the dust of the ages, or one which has just come forth, shining and clean, from the legislative laboratory of the atomic age. Whether the duty laid down by the statute is one relating to hitching a horse, locking an automobile, keeping a jet plane within its statutory confines, or (to look forward) having proper lights on an interplanetary space ship, the sane and simple rules of the Civil law will equally apply, and declare the non-performance of the duty "faute" for which, if it causes damage, reparation can be claimed in a civil action.

The Life of a Magistrate

I was now introduced to the chief magistrate of this country, who was desirous of seeing me. I will give you a short description of him. He was chosen (as is the custom there) for his superior bravery and wisdom. His power is entirely absolute during its continuance; but, on the first deviation from equity and justice, he is liable to be deposed and punished by the people, the elders of whom, once a year, assemble to examine into his conduct. Besides the danger which these examinations, which are very strict, expose him to, his office is of such care and trouble that nothing but that restless love of power so predominant in the mind of man could make it the object of desire, for he is indeed the only slave of all the natives of this country. He is obliged, in time of peace, to hear the complaint of every person in his dominions and to render him justice; for which purpose every one may demand an audience of him, unless during the hour which he is allowed for dinner, when he sits alone at the table, and is attended in the most public manner with more than European ceremony. This is done to create an awe and respect towards him in the eye of the vulgar; but lest it should elevate him too much in his own opinion, in order to his humiliation he receives every evening in private, from a kind of beadle, a gentle kick on his posteriors; besides which he wears a ring in his nose, somewhat resembling that we ring our pigs with, and a chain round his neck not unlike that worn by our aldermen; both which I suppose to be emblematical, but heard not the reasons of either assigned. (Henry Fielding: The History of the Life of the Late Mr. Jonathan Wild the Great)