LEGISLATION AND THE STANDARD OF CARE IN NEGLIGENCE

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Introduction

Negligence is dangerous conduct, conduct involving an unreasonable risk of harm. In a negligence action, once it is established that the defendant owed the plaintiff a duty of care, it is usually left to the jury to determine whether the defendant was in breach of that duty.[1] The issue of breach of duty is often referred to as the "negligence"[2] or "fault"[3] issue. While the "duty" issue is a question of law for the judge,[4] the "negligence" issue is a question of fact for the jury.[5]

In passing the "negligence" issue to the jury, the judge gives them general instructions on the standard of care in terms of the reasonable man of ordinary prudence.[6] It is for the jury to con-

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[1] The onus of proving both duty and its breach is on the plaintiff: Fleming, Torts (2nd ed., 1961), p. 265, hereinafter cited as Fleming. If there is no jury, the judge decides the breach of duty issue.

[2] Fleming, p. 116; Prosser, Torts (2nd ed., 1955), p. 165, hereinafter cited as Prosser.

[3] Morris, The Relation of Criminal Statutes to Tort Liability (1933), 46 Harv. L. Rev. 453. Morris points out that the "negligence" or "fault" issue involves two things: first the determination of the facts of the defendant's conduct; second the determination whether that conduct was justifiable.

The "negligence" or "fault" issue is not always left to the jury: Fleming, pp. 260-261; Morris, *ibid.*, at pp. 453-454.

[4] The terms "judge" and "court" will be used interchangeably.

[5] It is an oversimplification to distinguish between judge and jury functions on the basis of law and fact. Even if the distinction between law and fact were clear, which it is not, no such distinction can be drawn between judge and jury functions. This is true of the "duty" and "negligence" issues. Both involve mixed questions of law and fact, and judge and jury have parts to play in the determination of both issues: Fleming, pp. 259-260; Prosser, pp. 191-194.

See generally on the division of functions between judge and jury: James, Functions of Judge and Jury in Negligence Cases (1949), 58 Yale L.J. 667.

[6] Fleming, pp. 118, 260; Prosser, pp. 125, 193. The instructions usually take this, or a similar form: "Negligence is doing something which a reasonable man of ordinary prudence would not do in like circumstances or failing to do something which a reasonable man of ordinary prudence

cretize the general standard and formulate a specific standard of care for the case before them.

How a jury establish a specific standard of care is conjectural. In theory, in deciding what the hypothetical reasonable man would have done in the defendant's circumstances, the jury are to take into account a number of factors: the chance of harm resulting from the defendant's conduct; the seriousness of the harm if it does occur; the utility of the defendant's conduct; the measures that would have to be taken to eliminate the risk of harm; the value of the interest interfered with.[7] Once the jury decide what the reasonable man would have done, they must compare this hypothetical conduct with what the defendant did, and thus assess his conduct as either negligent or non-negligent.

Before the jury can assess the defendant's conduct, however, the plaintiff must adduce evidence of what that conduct consisted. The subject for investigation in this article is the effect in a negligence action of proof by the plaintiff that the defendant violated a statute;[8] in particular, the effect of such proof on the jury's formulation of the standard of care.[9]

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would do in like circumstances." It is misdirection for the judge to tell the jury to put themselves in the defendant's position: *Arland* v. *Taylor*, [1955] O.R. 131, [1955] 3 D.L.R. 358 (C.A.).

The jury probably pay little attention to instructions about the reasonable man. No doubt in most cases they do put themselves in the defendant's position, and they do compare the defendant's conduct with what they would have done. "The 'ordinary prudent man' is a palpable fiction, designed to present to the jury's mind in concrete form the conception of an external as distinguished from a personal standard. What this imaginary person would have done really means what the jury thinks was the proper thing to do; and so long as there is room for a fair difference of opinion on this point the jury has a free hand": Thayer, Public Wrong and Private Action (1914), 27 Harv. L.R. 317, at pp. 317-318, footnotes omitted.

[7] "It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued.": Prosser, p. 123, footnote omitted.

In theory the jury are to assess these factors through the eyes of the reasonable man. As mentioned before, *supra*, footnote 6, it seems unlikely that juries pay much attention to instructions about the reasonable man; it seems just as unlikely that juries actually go through this balancing process.

[8] The plaintiff has the burden of proving that the defendant violated the statute: Street, Torts (2nd ed., 1959), p. 283.

[9] See generally: Fleming, pp. 130-137; Harper & James, Torts (1956), vol. 2, ss. 17.5, 17.6; Prosser, s. 34; Street, *op. cit.*, *ibid.*, Ch. 14; Wright, Cases on the Law of Torts (3rd ed., 1963), pp. 311-336; Fricke, The Juri-Morris, *op. cit.*, footnote 3 and The Role of Criminal Statutes in Negligence Morris, *op. cit.*, footnote 3. The Role of Criminal Statutes in Negligence Actions (1949), 49 Col. L. Rev. 21; Thayer, *op. cit.*, footnote 6; Williams, The Effect of Penal Legislation in the Law of Tort (1960), 23 Mod. L. Rev. 233.

What are the possible effects in a negligence action of proof by the plaintiff that the defendant violated a statute? There seem to be three choices: first, proof of the defendant's breach of a statute could be irrelevant in the negligence action. It would have no effect on the jury's formulation of the standard of care. Second, proof of the defendant's breach of a statute could be conclusive proof of the defendant's negligence. The statute would establish the standard of care and thus take the determination of the "negligence" issue from the jury. The jury's only function in connection with the "negligence" issue would be to decide whether, in fact, the statute had been violated. Third, proof of the defendant's breach of a statute could have an effect in between the first and second choices. It would be relevant in the negligence action, but it would not be conclusive of the defendant's negligence. Proof of the defendant's breach of a statute would be merely evidence of the defendant's negligence to be taken into account by the jury in formulating the standard of care. These choices will be considered seriatim.

I. *Defendant's Breach of Statute Irrelevant in Negligence Action.*

Should some statutes be irrelevant in negligence actions?

> A vital factor, which is often overlooked, is that there is no justification for allowing a criminal statute to serve as a basis for civil liability, unless it prescribes a fixed *standard of conduct* as a substitute for that of the reasonable and prudent man which ordinarily guides the decision of judge and jury. It is only when the very object of the legislation is to put beyond controversy whether the particular precaution is one which ought to be taken, that the doctrine of statutory negligence has any place. If the legislature sets no standard of conduct with which the common law standard would invidiously compete, it will be adding a penalty to the statute to allow breach of the criminal provision to provide the basis for additional recovery of damages. This is most clearly seen in relation to statutory requirements for licensing of drivers or registration of vehicles. Suppose a defendant

This article is concerned only with defendant's breach of statute in a negligence action. On plaintiff's breach of statute see Fleming, pp. 242-244; Prosser, pp. 162-163. Statutory breaches may be relevant in other tort actions: Prosser, p. 154.

In this article, unless otherwise specified, the word statute is used to include all forms of legislation. On subordinate legislation generally, see Driedger, Subordinate Legislation (1960), 38 Can. Bar Rev. 1.

Compliance with a statute will also be relevant in connection with the jury's determination of the standard of care. The better opinion is that compliance is not always conclusive of care: *Schiffner* v. *C.P.R.* (1951), 2 W.W.R. (N.S.) 193, [1951] 4 D.L.R. 172 (Sask. C.A.). This case will be found in Wright, *op. cit.*, p. 333; Harper & James, *ibid.*, p. 1014; Prosser, pp. 163-164; Morris, The Role of Criminal Statutes in Negligence Actions, *ibid.*, at pp. 42-46.

> whilst driving a car without a licence, collides with the plaintiff. It would be absurd to permit the latter to establish the driver's negligence by reference to his violation of the licensing statute, because it does not specify a standard or correct way of doing anything. An unlicensed driver may conduct himself with utmost care and, in any case, his want of a license can never be probative of his not having done so. It is not even presumptive evidence of negligence and should be wholly excluded from the inquiry whether the defendant's conduct was actionable.[10]

This quotation suggests that only safety statutes, statutes setting standards of conduct, fixed ways of doing things for the protection of the person or property of others, should be relevant in negligence actions, and that licensing statutes can never so qualify. Admittedly, licensing statutes do not specify standard or correct ways of carrying on activity. Licensing statutes, however, may have safety as a purpose.[11] A licensing statute that requires a competency test as a prerequisite for obtaining a license has safety as a purpose.[12] A statute may promote safety directly by establishing fixed ways of carrying on certain activity, for example, a statute prescribing maximum speed limits for driving cars; a statute may promote safety indirectly by requiring that persons who carry on certain activity demonstrate a standard of competence before they engage in that activity, for example, a licensing statute requiring car drivers to pass a competency test before they receive

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[10] Fleming, pp. 134-135, footnotes omitted; Gregory, Breach of Criminal Licensing Statutes in Civil Litigation (1951), 36 Cornell L.Q. 622. But see Harper & James, *op. cit.*, *ibid.*, s. 20.2, pp. 1120-1121 where, in dealing with licensing statutes having not only a revenue but a safety purpose, the authors say: "May the want of license be considered as *some* evidence that unskillfulness contributed to the accident? Some courts say no. But this effectively deprives the victim of any benefit, in a civil case, of a statute concededly passed in part for his protection. Nor does the ruling seem theoretically sound. The legislature has decided that the general safety requires the activity in question to be limited to those who can demonstrate at least a minimum of special skill. It is fair to assume that the unlicensed as a class are far less likely than those licensed to have the skill for which a license is required. And it is certainly true that when the unskilled attempt what it takes skill to do, some of the intangible factors that go to make up lack of skill are far more likely than not to have contributed to any mishap that occurs. Frequently they do this in ways that are hard to prove; moreover, what evidence there is in the matter is likely to be in the defendant's hands." Footnote omitted. It is submitted that this is the sounder position.

[11] By the purpose of a statute I mean the purpose of the legislature in enacting it. "The purpose of the legislation is of course a matter of interpretation of its terms, in the light of the evil to be remedied." Prosser, p. 156.

For a skeptical and amusing view of the traditional judicial approach to the interpretation of statutes generally, see Willis, Statute Interpretation in a Nutshell (1938), 16 Can Bar Rev. 1.

[12] *Supra*, footnote 10.

a licence to drive. In both cases safety is a purpose of the legislation.[13]

In *Field* v. *Supertest Petroleum Corporation*,[14] the plaintiff's statement of claim alleged that the defendant motorist "was not a skilled or reasonably skilled operator and did not hold an operator's license as required by the Highway Traffic Act". The Master in striking out the last half of this allegation, as not constituting a material fact on which the plaintiff was entitled to rely, said:[15]

> The fact that the defendant Cribari did not hold an operator's license, as required by the Highway Traffic Act, if established, might be said to augment the charge that he was not a skilled operator. That might be so if the holding of an operator's license indicated skill on the part of the operator, or if his failure to hold an operator's license, as required by the Act, established lack of skill. Although an operator's license can only be obtained on such terms and conditions, and subject to such regulations and restrictions as the Lieutenant-Governor in Council may prescribe (s. 72(3)), it is not a certificate of fitness or skill on the part of the holder of a license.
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> For these reasons I am of the opinion that whether the defendant Cribari held or did not hold an operator's license as required by The Highway Traffic Act, is not a material fact upon which the plaintiff may rely. At the very most, and on the highest possible ground, it may only be evidence by which the lack of skill of the defendant Cribari may be established, but in that event, and as such, it is specifically excluded from the statement of claim by Rule 141.

The absence of an operator's license should only be evidence of lack of skill and thus of negligent driving on the occasion in question where a competency test is a prerequisite for obtaining a license. If a competency test is not required, the absence of an operator's license should always be irrelevant in a negligence action against the unlicensed driver.[16]

The failure to have a statutory license is often disregarded in a negligence action because of alleged lack of causal connection between the plaintiff's injury and the breach of statute.[17] This is

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[13] *Leask Timber and Hardware Pty. Ltd.* v. *Thorne* (1961), 106 C.L.R. 33, at p. 44 (*per* Kitto J.).

[14] [1943] O.W.N. 482 (Mast.).

[15] *Ibid.*, at pp. 483-484.

[16] For an example of the type of statutory licensing provision that is irrelevant in a negligence action see *Roy Swail Ltd.* v. *Reeves* (1956), 2 D.L.R. (2d) 326 (S.C.C.), where it was held that the omission to register a truck or obtain a permit for it as a commercial vehicle, in violation of a statute, was irrelevant in a negligence action against the driver of the truck. Such a statute does not have safety as a purpose.

[17] *City of Vancouver* v. *Burchill*, [1932] S.C.R. 620, [1932] 4 D.L.R. 200 (plaintiff's breach); *Downey* v. *Hyslop* (1930), 65 O.L.R. 548, [1930] 4 D.L.R. 578 (C.A.); *Jenner* v. *Pelland* (1953), 9 W.W.R. 417 (Man., *per* Freedman J.); *Honor* v. *Bangle* (1920), 19 O.W.N. 380 (*per* Middleton J.).

an unsatisfactory way of dealing with licensing statutes. A defendant's breach of a statute, whether licensing or not, never causes an injury.[18] The defendant's conduct may or may not have been a cause in fact of the plaintiff's injury;[19] unless it was a cause in fact of the plaintiff's injury the defendant will not be liable to the plaintiff. When causation in fact is disputed, the plaintiff has the burden of proving the causal connection between his injury and the defendant's conduct.[20] In a negligence action, after the plaintiff proves the causal connection between his injury and the defendant's conduct the plaintiff must prove that such conduct was negligent. The fact that the defendant's conduct involved a breach of a statute may be important in determining the "negligence" issue.

Suppose a negligence action arising out of a two-car collision. Assuming that the defendant driver did not have an operator's license, his conduct, driving the car, was a breach of the licensing statute. His conduct was also a cause in fact of the accident. The aspect of his conduct which is in question in the negligence action, however, is the way he drove the car. The way he drove the car was not a breach of the licensing statute, although it may have been a breach of other legislation. The issue in the negligence action, with respect to the defendant's failure to have an operator's license, is whether the absence of a license is any evidence of the way he drove his car. As mentioned earlier,[21] the absence of an operator's license should only be evidence of lack of skill and thus of negligent driving where the licensing statute requires a competency test as a prerequisite for obtaining a license. In such circumstances, if the absence of an operator's license is held to be evidence of negligent driving, the defendant can always escape liability by showing that he has standard skill, or that in the particular circumstances he was careful.

[18] Prosser, p. 155. "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. . . . If the act or omission which violates a criminal statute lacks any causal relation to the injury, it is plain that breach of the statute has no bearing on liability.": Lowndes, Civil Liability Created by Criminal Legislation (1932), 16 Minn. L. Rev. 361, at pp. 371-372.

[19] "Cause and effect are pure questions of fact. Did the defendant's conduct cause the injury of which the plaintiff is complaining? In not one case in a thousand is there any question that it did. The only troublesome case of cause 'in fact' are those where acts of two or more persons combine to produce a given injury." Wright, The Law of Torts (1948), 26 Can. Bar Rev. 46, at p. 58, footnote omitted.

[20] Prosser, pp. 222-223. On causation in fact generally, see Green, The Causal Relation Issue in Negligence Law (1962), 60 Mich. L. Rev. 543.

[21] *Supra.*

Leask Timber and Hardware Pty. Ltd. v. *Thorne*[22] illustrates some of the causation problems involved in licensing statutes. A New South Wales statute[23] provided, in effect, that a power crane should not be operated by anyone who did not hold a certificate of competency as a power crane driver. The statute imposed penalties on both the driver who operated a power crane without a certificate and his employer. The plaintiff's husband was killed by a power crane operated in breach of the licensing provision. The plaintiff sued the employer claiming that the statute conferred a civil cause of action on anyone injured by a power crane operated by an uncertificated driver.[24] A majority[25] in the High Court of Australia held that the statute did not confer civil causes of action. The issue was not the relevance of the licensing statute in a negligence action. Many of the observations in the *Leask Timber* case, however, are significant for the problem under discussion, which is, are breaches of licensing statutes irrelevant in negligence actions and, if they are, why are they irrelevant.

The Full Court of the Supreme Court of New South Wales had held that the statute did confer civil causes of action.[26] In the High Court, Dixon C.J., put the problem in this way:[27]

> The question which appears to me to lie at the heart of this case is whether the effect of s. 17 of the *Scaffolding and Lifts Act*, 1912-48 (N.S.W.) is to enact that it shall be an offence to drive or to authorize the driving of a power crane unless the driver possesses a certificate of competency to do so and, in so enacting, impliedly to give a civil remedy in damages to a member of the public who suffers personal injury by reason of the driving of the crane which is unlawful because the crane is driven without compliance with the condition.

In answering this question the Chief Justice said:[28]

> For some reason which I have not quite understood, a great deal of discussion seems to have taken place in the Supreme Court . . . concerning causation.[29] . . . I cannot myself understand how it can be said that the death . . . could be attributed to the absence of a certificate of competency. Stated in that manner the issue raised would seem impossible. Plainly, as it seems to me, the death is caused by the

[22] *Supra*, footnote 13.
[23] Scaffolding and Lifts Act, 1912-1948.
[24] The problem of statutes conferring civil causes of action will be discussed later.
[25] Dixon C.J., Kitto, Taylor and Windeyer JJ., McTiernan J. dissenting.
[26] *Thorne* v. *Leask Timber and Hardware Pty. Ltd.* (1960), 78 W.N. 311.
[27] *Supra*, footnote 13, at p. 36.
[28] *Ibid.*, at p. 38.
[29] The Supreme Court of New South Wales were concerned with whether the defendant's breach of statute was a cause in fact of the death; they concluded that it was.

> driving of the crane. . . . If you accept the fact that the man was killed by the operation of the crane, the only question that remains is whether the operation was unlawful and gave rise to a civil action in the person injured or those suing in respect of his death from his injuries. No question of causation arises. The sole question is whether when s. 17(1) or (3) forbids the operation of a crane without a certificate of competency it means that a civil right of action shall arise from the operation of a crane without fulfilment of the condition. After some doubt I have reached the conclusion that it does not do so.

On the other hand, Kitto J. felt that:[30]

> In the final analysis the question whether s. 17(3) creates private rights depends upon the answer to be given to the second of the questions raised by the appellant's argument, namely, the question whether there can be a causal relation between, on the one hand, the lack of a certificate on the part of a person who is allowed to drive a power crane and, on the other hand, an injury sustained through the driving of the crane by that person.
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> It may be conceded, as a general proposition, that a certificated driver is more likely to be competent than an uncertificated driver; but this is irrelevant. If a person is injured by the incompetent driving of a power crane, the cause of the injury is the incompetent conduct of the driver — that which he does or omits and would not have done or omitted if he had acted competently. The absence of a certificate, if he is uncertificated, is not the cause. And *e converso* the cause is still incompetent driving, even if he has a certificate.

Merely because the breach of statute could not be said to be a cause of the death did not conclude the matter for Dixon C.J., as it did for Kitto J. Dixon C.J. still had to determine whether the statute created a civil cause of action; the lack of causal connection between the breach of statute and the death would not have prevented him from finding that the statute conferred a civil cause of action, if the requirements for such a finding had been present. Dixon C.J.'s approach is better, it is submitted, than Kitto J.'s approach, which raises an "impossible" issue: did the breach of statute cause the death?

The Chief Justice's approach would also seem to be the proper approach to be taken to the breach of a licensing statute in a negligence action. The breach of a licensing statute is not irrelevant in a negligence action simply because the breach cannot be said to have been a cause of the accident. It may still be evidence of the defendant's lack of skill and thus of his negligence. In the passage quoted from Kitto J.'s judgment in the *Leask Timber* case there is an implication that he might have considered the ab-

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[30] *Supra*, footnote 13, at p. 45.

sence of a certificate of competency as evidence of the driver's negligence.[31]

The breach of a licensing statute should be irrelevant in a negligence action, unless the statute provides for a competency test as a condition of obtaining a license. If provision is made for a competency test, then one of the purposes of the licensing statute is safety. It may be, however, that even where safety is a purpose of a licensing statute a breach thereof will not always be relevant in a negligence action. As one noted American writer has said:[32]

> Consider the licensing cases, the unlicensed driver who runs down a pedestrian and is charged with negligence. In such cases there is usually no question that the driver's conduct in driving the motor vehicle contributed to the victim's injury. Nothing more needs to be known on the issue of causal relation. To attempt to link the victim's injury to an absence of a driver's license would be impossible as well as uncalled for. If the absence of a license has any relevance at all it must be to some other issue. Did the driver owe a duty to the pedestrian to have a license? Was he negligent in not having a license with respect to the injury suffered by the pedestrian? If the absence of a license were relevant to show the driver's incompetence that would go only to the negligence issue. Even for that purpose the factual data incident to the collision would overshadow any inference that could be drawn from the absence of a license. Moreover, if in some case the absence of a license might be relevant as a circumstance to bolster some other circumstance, it might well be excluded on the basis that it would tend to prove too much, *i.e.*, give too great weight in the minds of jurors. The only certain generalization that can be made is that it has no relevance at all to the causal relation issue, and there is no general rule that would make it relevant to other issues.

This suggests that whether the breach of a licensing statute is relevant in a negligence action is a question for the court in each case. It may be that the problem of the relevancy of licensing statutes in negligence actions cannot be dealt with in more specific terms.

Licensing statutes aside, are there certain statutes that should be irrelevant despite the fact that they are passed to promote safety? It has been suggested that obsolete and unreasonable safety statutes, such as those requiring "speed limits of six miles an hour", should be irrelevant in negligence actions.[33] The unreasonableness of a safety statute would be a question of law for

[31] "It may be conceded, as a general proposition, that a certificated driver is more likely to be competent than an uncertificated driver; . . ." *ibid.*

[32] Green, *op. cit.*, footnote 20, at pp. 547-548, footnotes omitted. But see text accompanying footnote 10, *supra.*

[33] Prosser, pp. 160-161; Morris, The Role of Criminal Statutes in Negligence Actions, *op. cit*, footnote 9, at pp. 39-42.

the court. Many courts have refused, however, to hear evidence of unreasonableness.[34]

In conclusion on the kinds of statutes that should be held irrelevant in negligence actions, this much can be said: statutes not enacted to promote safety, directly or indirectly, should be irrelevant in negligence actions. In addition, certain safety statutes, because of the unreasonableness of the standard of care that they require, should also be irrelevant in negligence actions. The relevancy of licensing statutes that have safety as a purpose should be a question for the court in each case.

Assuming the relevancy in a negligence action of proof of defendant's breach of a safety statute, the effect on the course of the action must now be considered.

II. *Defendant's Breach of Statute Conclusive of His Negligence.*

When will proof of the defendant's breach of a safety statute be conclusive proof of his negligence? When will a safety statute be held to have conclusively established the standard of care required of the defendant, and thus to have taken the determination of the "negligence" issue from the jury? The breach of a statute that is held to have this effect is usually said to give rise to negligence *per se*, that is, negligence as a matter of law.

> According to the received doctrine in England and Australia, the negligence *per se* rule rests on a supposed or 'presumed' intention of the legislature to provide a civil remedy, so long as this can be 'inferred' as a matter of construction, having regard to the scope, purview and structure of the provision.[35]

Direct Lumber Co. v. *Western Plywood Co.*[36] illustrates that this is also the received doctrine in Canada. The plaintiff sued the defendant for damages, founding its action on an alleged breach by the defendant of certain sections of the Criminal Code.[37] The sections, although providing criminal penalties for their breach,

[34] *Ibid.*

[35] Fleming, p. 131; Street, *op. cit.*, footnote 8, p. 273; Fricke, *op. cit.*, footnote 9, at p. 260.

The most widely accepted American rationalization of the negligence *per se* rule is that the reasonable man always obeys the criminal law; thus a breach of the criminal law must be unreasonable and, therefore, negligent. Fleming, p. 132; Harper & James, *op. cit.*, footnote 9, pp. 997-998. This rationalization is attributed to Professor Thayer's pioneer article: Thayer, *op. cit.*, footnote 6.

[36] [1962] S.C.R. 646, 35 D.L.R. (2d) 1; aff'ing (1962), 37 W.W.R. 177, 32 D.L.R. (2d) 227 (Alta. A.D.).

[37] S.C., 1953-54, c. 51, ss. 411(1)(c), 412(1)(a), 412(2); repealed by S.C., 1960, c. 45, s. 21 and absorbed into ss. 32 and 33A of the Combines Investigation Act, R.S.C., 1952, c. 314 as am. by S.C., 1953-54, c. 51, s. 750; S.C., 1959, c. 40; and S.C., 1960, c. 45.

said nothing about civil liability. In affirming the dismissal of the action, Judson J., giving judgment for the court,[38] said:[39]

> I am satisfied . . . that this criminal legislation gives no civil cause of action for its breach and I would affirm the judgment under appeal for the reasons given by Johnson J.A. that this legislation creating a new crime was enacted solely for the protection of the public interest and that it does not create a civil cause of action. There is no new principal involved and in spite of repeated consideration of the problem, nothing has been added to what was said about it by Duff J. in *Orpen* v. *Roberts:*
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> "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 legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended 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".

The received doctrine of negligence *per se* goes further than merely establishing the conclusive standard of care in negligence actions. If a court finds[40] that the legislature intended to confer civil causes of action when it enacted a statute, a breach of that statute does more than conclusively prove the defendant's negligence. It is not a question of the legislature intending to establish the standard of care in negligence actions, but rather, of the legislature intending to confer civil causes of action on persons injured by conduct involving breaches of the statute; a statutory civil cause of action is created quite distinct from the common-law action for negligence.[41] Thus the heading to this section, and even the title of this article are misnomers to a certain extent.

It is one thing for the legislature to expressly confer a civil cause of action on anyone injured by conduct involving a breach of a statute;[42] it is an entirely different thing for a court to infer

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[38] Consisting of Kerwin C.J.C., Locke, Martland, Judson and Ritchie JJ.

[39] *Supra*, footnote 36, at pp. 648-649 (S.C.R.) footnote omitted; accord: *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832, at pp. 840-841 (*per* Atkin L.J.). This case will be found in Wright, *op. cit.*, footnote 9, p. 312.

[40] The interpretation of the statute is a question of law for the court.

[41] *Contra, Lochgelly Iron & Coal Co.* v. *M'Mullan*, [1934] A.C. 1. This case will be found in Wright, *op. cit.*, footnote 9, p. 326; *see L.P.T.B.* v. *Upson*, [1949] A.C. 155, at p. 168 (H.L., *per* Lord Wright).

The distinction between an action on the statute and an action for negligence will be discussed later.

The action on the statute is often referred to as "statutory negligence." Fricke, *op. cit.*, footnote 9, at p. 249.

[42] Such a provision is to be found in the Railway Act, R.S.C., 1952, c. 234, s. 392. Subject to the constitutional problem in Canada, to be dealt

a legislative intention to affect civil rights when the statute is silent on the question of civil liability. This part of the article is concerned with the situation where the statute is silent on the question of the civil consequences of its breach, and yet the court proceeds to find that the legislature intended to confer civil causes of action.

There are objections to inferring an intention to create civil causes of action where the statute is silent on the question of civil liability. As one American authority has said:[43]

> What is the probability as to the actual state of mind of the legislature: (a) that it intended to provide a civil remedy, but did not say so; (b) that it intended not to provide any such remedy, and omitted it intentionally; or (c) that it never thought about a civil remedy at all?

Can there be any doubt that either (b) or (c) represents the actual state of mind of the legislature?[44] And where the legislature expressly provides for criminal punishment and is silent on the question of civil liability, what of the rule of construction: *expressio unius est exclusio alterius*?[45]

Since our courts pursue this "will-o'-the-wisp of a nonexistent legislative intention",[46] it is important to discover the factors that influence them in manufacturing this intent. Are there any indications in the decisions of the type of safety statute in which the courts will find this nonexistent legislative intent and the type of safety statute in which they will not? We can place little reliance on the language used by most of our judges, because they insist that they are only interpreting the statute and discovering the intention of the legislature. Thus it has been said:[47]

> In my opinion, when an Act imposes a duty of commission or omission, the question whether a person aggrieved by a breach of the duty has a right of action depends on the intention of the Act. Was it intended to make the duty one which was owed to the party aggrieved as well as to the State, or was it a public duty only? That depends on the construction of the Act and the circumstances in which it was made and to which it relates. One question to be considered is, Does the Act contain reference to a remedy for breach of it? Prima facie if it does that is the only remedy. But that is not conclusive. The inten-

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with later, there is no objection to a legislature expressly conferring civil causes of action.

[43] Smith & Prosser, Cases on Torts (2nd ed., 1957), p. 296.

[44] Fleming, p. 131; see Harper & James, *op. cit.*, footnote 9, p. 995; Fricke, *op. cit.*, footnote 9, at pp. 263-264; Thayer, *op. cit.*, footnote 6, at p. 320.

[45] Fricke, *op. cit.*, *ibid.*, at p. 257. But see Willis, *op. cit.*, footnote 11, at pp. 7-8.

[46] Harper & James, *op. cit.*, footnote 9, p. 995, n. 5.

[47] *Phillips* v. *Britannia Hygienic Laundry Co.*, *supra*, footnote 39.

> tention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals.

and:[48]

> There are a number of statutes by which duties are imposed and remedies provided for the breach in relation to which it has been held that the remedy is exclusive, while in others it has been held that there is, in addition to the statutory remedy, a right of action to recover damages resulting from the breach of the statutory duty. Here, again the difficulty is to discover the principle which determines where the line is to be drawn. . . . The dividing line is to be found in the intention of the Act of Parliament, and . . . one of the means of determining what that intention is is to ascertain whether the duty is a duty owed primarily to the state or community, and only incidentally to the individual, or primarily to the individual or class of individuals, and only incidentally to the state or community.

Here, on the other hand, is a more realistic judicial appraisal of what our courts are doing when they manufacture a legislative intent to confer civil causes of action:[49]

> The received doctrine is that when a statute prescribes in the interests of the safety of members of the public or a class of them a course of conduct and does no more than penalize a breach of its provisions, the question whether a private right of action also arises must be determined as a matter of construction. The difficulty is that in such a case the legislature has in fact expressed no intention upon the subject, and an interpretation of the statute, according to ordinary canons of construction, will rarely yield a necessary implication positively giving a civil remedy. As an examination of the decided cases will show, an intention to give, or not to give, a private right has more often than not been ascribed to the legislature as a result of presumptions or by reference to matters governing the policy of the provision rather than the meaning of the instrument. Sometimes it almost appears that a complexion is given to the statute upon very general considerations without either the authority of any general rule of law or the application of any definite rule of construction. . . . Perhaps in the end, a principle of law will be acknowledged as the foundation of the cases.

Despite the traditional search for legislative intention, there are indications in the cases of some of the factors that influence the courts in manufacturing or refusing to manufacture this intention.

The courts are more willing to find the legislative intention to create civil causes of action when the person on whom the statutory

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[48] *Read* v. *Croydon Corp.*, [1938] 4 All E.R. 631, at p. 652 (K.B.D., *per* Stable J.).

[49] *O'Connor* v. *S.P. Bray Ltd.* (1937), 56 C.L.R. 464, at pp. 477-478 (*per* Dixon J.); accord: *Australian Iron & Steel Ltd.* v. *Ryan* (1957), 97 C.L.R. 89, at p. 97-98 (*per* Kitto J.).

duty is placed is already under a common-law duty to use care with respect to the matter dealt with by the safety statute.[50] This attitude is illustrated by *Commerford* v. *Board of School Commissioners of Halifax*.[51] The plaintiff fell on the snow and ice on the municipal sidewalk in front of the defendant's premises. Owners of premises owe no duty of care at common law to clean municipal sidewalks.[52] In the *Commerford* case, a city ordinance required owners to remove the snow from and to sand the ice on the sidewalks in front of their premises. The ordinance imposed criminal penalties on violators. The defendant had violated the ordinance and the issue was whether the ordinance conferred a civil cause of action on a person injured by conduct involving its breach. Ilsley J. held it did not. He made the usual search for legislative intention, during the course of which he said:[53]

> The fact that the duty of abutting owners and occupiers to remove snow and put sand on ice in streets is completely non-existent at common law, confirm me in the view that liability for damages for breach of a purely statutory obligation should not be found to exist except on well-established grounds.

On the other hand, there are a number of "animal-on-the highway" cases in which legislation making it unlawful for animals to wander on the highway has been held to give civil causes of action to persons injured by wandering animals; this has been the judicial interpretation of this legislation despite the fact that, apparently, owners of land adjoining the highway owe no common-law duty of care to prevent harmless animals straying onto the highway.[54]

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[50] *O'Connor* v. *S.P. Bray Ltd.*, *ibid.*, at p. 478 (*per* Dixon J.); Fleming p. 133.

[51] [1950] 2 D.L.R. 207 (N.S., *per* Ilsley J.). This case will be found in Wright, *op. cit.*, footnote 9, p. 320; accord: *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441.

[52] Prosser, p. 430; Morris, The Role of Criminal Statutes in Negligence Actions, *op. cit.*, footnote 9, at p. 25; Thayer, *op. cit.*, footnote 6, at p. 329.

[53] *Supra*, footnote 51, at p. 219.

[54] See the Ontario cases discussed in Wright, *op. cit.*, footnote 9, (2nd ed., 1958), pp. 290-293.

In *Searle* v. *Wallbank*, [1947] A.C. 341 (H.L.), it was held that the owner or occupier of land adjoining the highway owed no common-law duty to use care to prevent his cattle straying on the highway. But see *Fleming* v. *Atkinson*, [1959] S.C.R. 513, 18 D.L.R. (2d) 81: three of the seven members of the court (Fauteux, Abbott, and Judson JJ.) held that the immunity of *Searle* v. *Wallbank*, *supra*, did not apply in Ontario; two others (Rand and Taschereau JJ.) held that, assuming, without deciding the point, that *Searle* v. *Wallbank*, did apply in Ontario, the case before them was distinguishable; only one member of the court (Cartwright J.) expressly held that *Searle* v. *Wallbank*, applied in Ontario. The seventh member of the court (Locke J.) expressed no opinion on

Conversely, even where the person on whom the statutory obligation rests is under a common-law duty to use care with respect to a matter dealt with by a safety statute, the courts will not invariably find that the legislature intended to confer civil causes of action on persons injured by conduct involving a breach of the statute. For example, the courts usually regard breaches of motor vehicle statutes as merely evidence of negligence, or at the most *prima facie* proof of negligence; even though drivers are under a common-law duty to use care in their driving, the courts do not consider that motor vehicle statutes create civil causes of action in favour of persons injured by conduct involving their breach.[55]

The most one can say is that where the defendant is under a common-law duty to use care with respect to a matter dealt with by a safety statute, the courts are likely to conclude that the defendant's breach of the statute confers a civil cause of action on a person injured by conduct involving that breach; where the defendant is not under a common-law duty to use care with respect to a matter dealt with by a safety statute, the courts are likely to conclude that the defendant's breach of the statute does not confer a civil cause of action on a person injured by conduct involving that breach.

The courts tend to find that the legislature did not intend to confer a civil cause of action on persons injured by conduct involving a breach of a safety statute, if to do so would result in

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whether the common law of England, as set out in *Searle* v. *Wallbank*, differed from the common law of Ontario. Thus *Fleming* v. *Atkinson*, *supra*, is inconclusive on the common-law duty of care owed by owners of harmless animals to prevent them straying on the highway. However, two Ontario cases decided after *Searle* v. *Wallbank*, and before *Fleming* v. *Atkinson*, accepted *Searle* v. *Wallbank*, and yet held (by way of *dicta*) that legislation making it unlawful to allow animals to run at large created civil causes of action in favour of persons injured by animals wandering on the highway: *Atkinson* v. *Fleming*, [1956] O.R. 801, 5 D.L.R. (2d) 309 (C.A.); *Noble* v. *Calder*, [1952] O.R. 577, [1952] 3 D.L.R. 651 (C.A.). Hence the conclusion in the text.

The position is otherwise in England: Williams, *op. cit.*, footnote 9, at p. 246. But see *Monk* v. *Warbey*, [1935] 1 K.B. 75 (C.A.).

[55] *Gauthier & Co.* v. *The King*, [1945] S.C.R. 143, [1945] 2 D.L.R. 48; *Yager Builders Ltd.* v. *Bestway Express Ltd.* (1963), 45 W.W.R. 444 (Man. C.A.); *Eaton* v. *O'Neil* (1962), 47 M.P.R. 101, 33 D.L.R. (2d) 45 (N.S. Sup. Ct. *in banc*); *MacInnis* v. *Bolduc* (1960), 45 M.P.R. 21, 24 D.L.R. (2d) 661 (N.S. Sup. Ct. *in banc*); *Clarke* v. *Brims*, [1947] K.B. 497 (*per* Morris J.); *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539 (McCardie J.); *cf.* text *supra*, where it was suggested that evidence of negligence is the greatest effect that should be given to a breach of a licensing statute in a negligence action. *Contra*, *Irvine* v. *Metropolitan Transport Co.*, [1933] O.R. 823, at p. 833, [1933] 4 D.L.R. 682, at p. 694 (*per* Masten J.A.); *see Winnipeg Electric Co.* v. *Geel*, [1932] A.C. 690, at p. 692 (P.C.); *Falsetto* v. *Brown*, [1933] O.R. 645, at p. 657, [1933] 3 D.L.R. 545, at p. 557 (*per* Davis J.A.).

strict liability. In *Phillips* v. *Britannia Hygienic Laundry Co.*,[56] the plaintiff was injured by the defective condition of the defendants' car. A motor vehicle regulation provided that: " . . . the motor car and all the fittings thereof shall be in such a condition as not to cause or to be likely to cause, danger to any person on the motor car or on any highway." The defendants were in breach of this regulation, although they had used reasonable care to see that their car was in safe condition, and thus were not guilty of common-law negligence. The issue was whether the regulation conferred a civil cause of action on anyone injured by its breach. Following the usual judicial approach, the court held that this depended on the intention of the legislature. Atkin L.J., gave this reason, among others, for holding that the legislature did not intend to confer civil causes of action:[57] "It is not likely that the Legislature intended by these means to impose on the owners of vehicles an absolute obligation to have them roadworthy in all events even in the absence of negligence."

There are safety statutes, however, in which the courts find the legislative intention to confer civil causes of action and, at the same time, hold that breaches result in strict liability.[58]

The courts are disinclined to find this elusive intention to confer civil causes of action when subordinate legislation is in question.[59] In the *Commerford* case,[60] Ilsley J., in concluding that it was not the intention of the legislature to empower the city council to confer civil causes of action on persons injured by conduct involving breaches of city ordinances, said:[61]

> But does the Charter empower the Council to impose liability for damages? The intention to confer a power to alter civil rights by Ordinance should certainly not be lightly assumed. See *Orpen* v. *Roberts*, . . . where Duff J. quotes with approval the remark of Meredith C.J. in *Tompkins* v. *Brockville Rink Co.*, . . . that when one considers the different kinds of acts and conduct which municipal councils in Ontario are by statute permitted to prohibit or regulate, and the multiplicity

[56] *Supra*, footnote 39.

[57] *Ibid.*, at p. 842; see *Clarke* v. *Brims*, *supra*, footnote 55.

[58] The courts frequently give this effect to safety legislation imposing specific duties on employers for the benefit of their employees. *Brown* v. *National Coal Board*, [1962] A.C. 574, at p. 592 (H.L., *per* Lord Radcliffe), [1962] Camb. L.J. 26; Fleming, p. 454.

[59] See generally on subordinate legislation Driedger, *op. cit.*, footnote 9.

[60] *Supra*, footnote 51.

[61] *Ibid.*, at pp. 216-217; accord: *Wyant* v. *Welch*, [1942] O.R. 671 [1943] 1 D.L.R. 13 (C.A.); *Phillips* v. *Britannia Hygienic Laundry Co.*, *supra*, footnote 39, at p. 842 (*per* Atkin L.J.); see Thayer, *op. cit.*, footnote 6, at pp. 320-321. *Contra*, *Atkinson* v. *Fleming*, *supra*, footnote 54 (dicta); *Noble* v. *Calder*, *supra*, footnote 54 (dicta); *Australian Iron & Steel Ltd.* v. *Ryan*, *supra*, footnote 49; *see* Fricke, *op. cit.*, footnote 9, at pp. 261-263.

> of duties they have authority to impose upon property owners and others within their jurisdiction, one is rather startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the non-performance of it. The Legislature of course did not expressly confer on the Council the power to impose liability for damages. It did expressly confer power to impose penalties. . . . It is reasonable to infer that with regard to violations of provisions of the Ordinances, remedies do not exist unless expressly authorized. I am therefore of opinion that the Charter does not confer on the Council power to impose liability for damages for contravention of this Ordinance.

In a country of divided legislative jurisdiction such as Canada, another factor that influences the courts in their pursuit of legislative intention is the constitutional difficulty of finding a Parliamentary intention to confer civil causes of action. The better opinion is that such an intention, if it were found to exist, would in many cases be unconstitutional;[62] it would be an invasion of the exclusive provincial power to legislate in relation to "Property and Civil Rights in the Province".[63]

In *Transport Oil Co.* v. *Imperial Oil Co.*,[64] the issue for the court was whether Parliament, when it enacted section 32 of the Combines Investigation Act,[65] intended to confer civil causes of action on persons injured by conduct involving a breach of that section. Middleton J.A., in giving judgment for the court, said:[66]

[62] Finkleman, Note (1935), 13 Can. Bar Rev. 517; Note (1941), 19 Can. Bar Rev. 51; see Laskin, Canadian Constitutional Law (2nd ed., 1960), pp. 862-865. See also *Direct Lumber Co.* v. *Western Plywood Co.*, *supra*, footnote 36, where the Supreme Court of Canada refused to express an opinion on the constitutional issue.

Apart from the criminal law power, under which a parliamentary intention to confer civil causes of action would appear to be unconstitutional, there may be other parliamentary powers under which such an intention would be *intra vires* Parliament. For example, Parliament probably can deal with the civil liabilities of those railways coming under dominion jurisdiction. See Finkleman, *supra*, at p. 522. In fact, section 392 of the Railway Act, R.S.C., 1952, c. 234, expressly confers civil causes of action on persons suffering injuries as a result of violations of the act. Apparently the constitutionality of this provision has never been questioned. For a recent case imposing liability under section 392 see *Paulsen* v. *C.P.R.* (1963), 37 D.L.R. (2d) 217, aff'd (1963), 43 W.W.R. 513, 40 D.L.R. (2d) 761 (Man. C.A.).

[63] British North America Act, 1867, 30-31 Vict., c. 3, s. 92(13).

[64] [1935] O.R. 215, [1935] 2 D.L.R. 500 (C.A.). This case will be found in Laskin, *op. cit.*, footnote 62, p. 862.

[65] R.S.C., 1927, c. 26; now R.S.C., 1952, c. 314, as am. by S.C., 1953-54, c. 51, s. 750; S.C., 1959, c. 40; and S.C., 1960, c. 45.

[66] *Supra*, footnote 64, at pp. 218-219 (O.R.).

Noting that the plaintiff in the *Transport Oil* case, *ibid.*, alleged that his injury had been inflicted by a combination of persons, Finkleman, *op. cit.*, footnote 62, at p. 521, argues that the court failed to phrase the issue properly, saying: "The right of action for injury caused by a conspiracy arises not by virtue of any federal legislation but by operation of the common law doctrine which gives a right of action to anyone injured

> The whole scope and trend of the Act indicate that the legislative intention was to create a criminal offence punishable as indicated by the section itself by a limited penalty and a limited term of imprisonment. . . . There is nothing from which any intention to give a private right of action could possibly be inferred.
>
> When it is remembered that we have a dual legislative system, the Parliament of Canada possessing exclusive jurisdiction over criminal law and the Provincial Legislature exercising sole jurisdiction over property and civil rights, I think it is plain that the Parliament of Canada in passing this Act intended it to be an exercise by it of the power to legislate with respect to crime and criminal law, and that it did not intend to interfere with the provincial jurisdiction over property and civil rights.

In *Wasney* v. *Jurazsky*,[67] the infant plaintiff, a boy of twelve, shot himself while playing with a rifle loaded with ammunition sold to him by the defendant in violation of the Criminal Code.[68] The issue for our purposes was the effect in the civil negligence action of the defendant's breach of the Criminal Code. The section of the Code, although imposing a criminal penalty, was silent on the question of the civil consequences of its breach.[69] Realizing the constitutional implications, Trueman J.A., with whom Dennistoun J.A. concurred on this point, said:[70]

> It is obvious that under our system of divided legislative jurisdiction sec. 119, although it can be referred to as setting up a standard of care which must be recognized in civil proceedings, gives no right of action to a person injured through its breach, and that if civil redress is sought the rights of the parties must be determined by common-law rules. It hardly need be said that is it otherwise if the injury results from the violation of a duty imposed by a provincial statute for the benefit of the person injured, and that it is immaterial in such an instance whether the action brought therefor is in negligence or for breach of the enactment.

This view recognizes that Parliament when enacting criminal

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by a criminal conspiracy, in this case a conspiracy to violate a Dominion statute. Thus the Dominion did not create any right of action in this connexion, a course which would undoubtedly be beyond its jurisdiction." See *Direct Lumber Co.* v. *Western Plywood Co.*, *supra*, footnote 36, at pp. 649-650 (S.C.R.); Laskin, *op. cit.*, footnote 62, p. 863; Wright, *op cit.*, footnote 9, p. 326.

[67] [1933] 1 W.W.R. 155, 41 Man. R. 46 (C.A.).

[68] R.S.C. 1927, c. 36, s. 119: "Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding fifty dollars who sells any firearm or gives or sells any pistol or airgun, or any ammunition therefor, to a minor under the age of sixteen years unless he establishes to the satisfaction of the justice before whom he is charged that he used reasonable diligence in endeavouring to ascertain the age of the minor before making such sale or gift and that he had good reason to believe that such minor was not under the age of sixteen years." The corresponding section in the new Code is section 88(1), S.C., 1953-54, c. 51.

[69] *Ibid.*

[70] *Supra*, footnote 67, at p. 166 (W.W.R.).

legislation cannot, constitutionally, expressly confer civil causes of action on persons injured by breaches of criminal provisions; a court, for this reason, will not infer an intention to confer civil causes of action when Parliament is silent on the question of the civil consequences of a criminal breach.[71]

More important is Trueman J.A.'s conclusion that the section of the Code, although it did not and could not confer a civil cause of action, was relevant in a civil action; it could be used by the court to establish a conclusive standard of care in the negligence action.[72] A judge who follows this approach, it is submitted, must decide the relevance of the Code provision in the civil negligence action: he must decide whether the breach of the Code is to be conclusive of the defendant's negligence, merely evidence of that negligence, or irrelevant.[73] If Trueman J.A. has stated the constitutional position correctly, which I believe he has, the relevance of the Code provision in a civil negligence action is not to be determined by a search for an unexpressed legislative intention as to its relevance. Parliament could not constitutionally have any intention in this respect. A judge must look elsewhere for help, if help is needed, in determining the relevance of the Code provision in the civil action. This is not to deny that a judge may be influenced, and quite legitimately influenced, in determining the issue of relevance by Parliament's purpose in enacting the Code provision — the judge discovering the purpose by one of the usual methods of statutory interpretation.[74] If a judge determines that one of Parliament's purposes in enacting a criminal safety provision was to protect a certain class of persons, of which the plaintiff is a member, against a certain type of harm, which the plaintiff has suffered, then the defendant's breach of the Code provision should be relevant in the negligence action.[75] Whether the defen-

[71] This may be merely an application of the so-called presumption of constitutionality: Laskin, *op. cit.*, footnote 62, pp. 144-145.

[72] This is what the American courts mean when they say a breach of a statute is negligence *per se*: Fleming, p. 132.

[73] Professor Morris develops the idea that it is the judge who should control the use of criminal statutes in civil litigation, in two excellent articles cited in footnotes 3 and 9.

[74] *Supra*, footnote 11. It is unusual for the courts to interpret the common law in the light of a statute: Willis, Note (1950), 28 Can. Bar Rev. 1140.

[75] Unless the judge determines that the criminal standard of care is unreasonable: *supra*.

Even if the plaintiff cannot bring himself within the class Parliament intended to protect, or the type of harm Parliament contemplated, this should not necessarily mean that the Code provision will be irrelevant in the negligence action: Harper & James, *op. cit.*, footnote 9, p. 1005; Prosser, p. 162. Although it is unusual for a court to proceed by way of analogy to a statute, it is not unknown: Willis, *ibid.*

dant's breach of the Code is conclusive proof of the defendant's negligence, that is, negligence, *per se*, or merely evidence of the defendant's negligence, which the jury may accept or reject, or perhaps, *prima facie* proof of negligence entitling the plaintiff to a verdict in the absence of an explanation by the defendant, is a question that the judge will have to decide in each case.[76] In deciding this question the nature of the class protected by the Code and the seriousness of the harm contemplated by the Code may be important considerations. Where, as in *Wasney* v. *Jurazsky*, an adult sells ammunition to a child in breach of the Criminal Code the "negligence" issue should not be left to the jury. The adult's breach of the Code should be conclusive of his negligence. This was Trueman J.A.'s conclusion in this case.[77]

A court's search for Parliament's purpose in enacting a Code provision, as an aid in determining the relevance of the provision in a civil negligence action, although a search for legislative intention, is far different from the fictional search for legislative intention to confer civil causes of action that most of our courts pursue. It is one thing for a court to find that a legislature intended by a criminal safety provision to protect a class of persons from a certain type of injury; it is quite a different thing for the court to draw an inference from this finding that, in addition to the criminal penalty expressly imposed on the offender, the legislature, although silent on the matter, intended to confer civil causes of action on persons injured by conduct involving a breach of the criminal provision.

The constitutional limitations on legislative action inherent in our federal system could be an important factor in convincing our courts of the unwisdom of the traditional search for legislative intention to confer civil causes of action. To date, however, there is no indication that the constitutional limitations have had any effect on the traditional approach to statutes.[78]

I have mentioned a number of factors that influence the courts

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[76] In my opinion, this suggested judicial approach to the relevance of Criminal Code provisions in civil negligence actions should be followed by the courts in deciding the question of the relevance of all safety statutes that do not expressly confer civil causes of action.

[77] *Supra*, footnote 67. *Contra*, *Fowell* v. *Grafton* (1910), 22 O.L.R. 550 (Div. Ct.), where it was held that the defendant's breach of section 119 of the Code was merely evidence of negligence for the jury.

[78] *Direct Lumber Co.* v. *Western Plywood Co.*, *supra*, footnote 36. Trueman J.A., in *Wasney* v. *Jurazsky*, *supra*, footnote 67, although appreciating that it would be unconstitutional for Parliament to confer civil causes of action on persons injured by breaches of the Criminal Code, took the traditional approach to provincial legislation.

in their search for the fictional legislative intention to confer civil causes of action. There may be others.[79]

This part of the article was entitled "Defendant's Breach of Statute Conclusive of His Negligence", and the question first posed was :"When will proof of the defendant's breach of a safety statute be conclusive proof of his negligence?"[80] From the material that followed it was obvious that this heading and this question were misnomers. Because of the traditional approach taken by the courts to statutes, the issue has been: "Does the safety statute confer civil causes of action on persons injured by conduct involving its breach?"; the issue has not been, as in my opinion it should be: "What is the effect of a breach of the safety statute in a civil negligence action?"

Before examining situations in which the courts consider that proof of the defendant's breach of a safety statute is merely evidence of his negligence, it seems advisable to examine some of the consequences of the traditional judicial search for the nonexistent legislative intention to confer civil causes of action.

III. *Consequences of Judicial Search For Legislative Intention to Confer Civil Causes of Action.*

Where a court discovers this nonexistent legislative intent to confer civil causes of action a number of consequences usually follow. The most important of these are: (1) The court considers that the plaintiff has a civil action based on the statute; this action is apart from any action he may have for common-law negligence. (2) The court considers it to be a question of legislative intent as to the persons who can complain about a breach of the statute, and as to the kind of harm against which they can claim protection. (3) The court also considers it to be a question of legislative intent whether the statute imposes strict liability. (4) The court tends to disregard a statute that the defendant has not violated.

These consequences will be examined in turn.

(1) *The plaintiff's action on the statute.*

If a court concludes that a legislature intended to confer civil causes of action on persons injured by conduct involving a breach of a statute, it seem logical that an injured person should bring his action on the statute;[81] this result would seem to follow whether

[79] See Fleming, pp. 132-134; Street, *op. cit., supra,* footnote 8, pp. 278-280.

[80] *Supra.*

[81] Harper & James, *op. cit.*, footnote 9, p. 995.

or not the injured person also has an action for common-law negligence. The usual practice in England, where the defendant has violated a safety statute, is for the plaintiff to plead both breach of statutory duty and negligence at common law.[82] There does not seem to be any comparable practice in Canada.

(2) *Persons protected and risks covered.*

Where a court finds that a statute confers civil causes of action, the persons who can complain about a breach of the statute, and the kind of harm against which they can claim protection are considered by the court to be questions of legislative intent. This is perhaps an inevitable consequence of the judicial pursuit of the fictional legislative intention to confer civil causes of action. If the legislature intends to confer civil causes of action, the legislature must also have an intention as to the limits of those civil causes of action: on whom they are conferred and against what kind of harm.[83]

Knapp v. *Railway Executive*[84] is an illustration of a limitation of the persons who can complain about a breach of a particular statute. The engineer of a train was injured because of the defendant's failure, in breach of statute, to close the gates at a level

[82] *Chipchase* v. *British Titan Products Co.*, [1956] 1 Q.B. 545 (C.A.). This case will be found in Wright, *op. cit.*, footnote 9, p. 319; *Kilgollan* v. *William Cooke & Co.*, [1956] 2 All E.R. 294 (C.A.). This case will also be found in Wright, *op. cit.*, p. 316; Salmond, Torts (12th ed., 1957), p. 474; Fricke, *op. cit.*, footnote 9, at p. 243.

Street, *op. cit.*, footnote 8, p. 273, points out that the total number of actions brought for breach of statutory duty in England is, perhaps, second in volume only to those brought for negligence.

[83] "As a corollary of the legislative purpose doctrine, a plaintiff cannot found his action on statutory violation unless he belongs to the particular class of individuals which the statute was intended to protect. . . . Pursuant to the same policy, it has become established that the injury incurred must be of a kind which it was the object of the legislature to prevent. In other words, only harm following within the scope of the risk contemplated by the provision will subject the offender to liability in damages." Fleming, pp. 135-136, footnote omitted; Harper & James, *op. cit.*, footnote 9, pp. 989-991; Street, *op. cit.*, footnote 8, p. 281.

I suggested earlier that, even where he finds that the legislature did not intend to confer civil causes of action, it is proper for a judge to look at the purpose of the statute in deciding what effect is to be given to a breach of the statute in a negligence action. In such a case, the judge must determine the relevance of the penal statute in the negligence action. The judge might hold the statute relevant in establishing the standard of care in the negligence action, even though the plaintiff or his injury does not come within the class of persons or kind of harm that the legislature intended to afford protection to and against. On the other hand, when a judge finds that the legislature intended to confer civil causes of action, the intention of the legislature, as to the class of persons and kind of harm, is controlling: unless the plaintiff can bring himself within the class of persons and kind of harm contemplated by the legislature, he cannot base his action on the statute. Harper & James, *ibid.*, p. 991.

[84] [1949] 2 All E.R. 508 (C.A.).

crossing. The court held that the engineer could not base his action on the statute, because the legislature intended to protect only the road-using public. The engineer did not come within that class.

Gorris v. *Scott*[85] is the classic example of the restriction of recovery to the kind of harm against which the legislature intended to afford protection. The plaintiffs' sheep were washed overboard during a storm while being carried on defendant's ship. The defendant had violated a penal statute requiring carriers to provide pens for livestock; his conduct had clearly been a cause of the plaintiffs' loss, because if the pens had been provided the sheep would not have been washed overboard. The court denied the plaintiffs recovery despite the fact that they came within the class of persons that the legislature intended to protect. Kelly C.B. said:[86]

> The Act was passed merely for sanitary purposes, in order to prevent animals in a state of infectious disease from communicating it to other animals with which they might come in contact. . . .
>
> That being so, if by reason of the default in question the plaintiffs' sheep had been overcrowded, or had been caused unnecessary suffering, and so had arrived in this country in a state of disease, I do not say that they might not have maintained this action. But the damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable.

Once a court decides that the legislature intended to confer civil causes of action, it tends to construe narrowly the risks against which the legislature intended to afford protection.[87] A good example of this narrow construction is found in the English cases dealing with employers' obligations, under section 14(1) of

[85] (1874), L.R. 9 Ex. 125. This case will be found in Wright, *op. cit.*, footnote 9, p. 315.

"This problem of risk is the same as in negligence: in both torts [negligence and breach of statutory duty] the risk or hazard must be foreseeable or within the Act, but the exact way in which the accident occurs need not be — and the courts . . . inevitably have a wide discretion in deciding where to draw what cannot be a hard and fast line between the two." Street, *op. cit.*, footnote 8, p. 281.

For a cumbersome attempt to deal with the risks contemplated by the legislature in terms of proximate cause see: *Bartlett* v. *Bayham Twp.*, [1960] O.R. 310, 24 D.L.R. (2d) 75 (C.A.).

For a recent negligence decision distinguishing between the "kind" and "mode" of injury see: *Hughes* v. *Lord Advocate*, [1963] A.C. 837 (H.L.).

[86] *Supra*, footnote 85, at pp. 127, 129-130.

[87] "All too frequently, courts have tended to construe statutes as intended to afford protection against a narrowly restricted type of hazard only, and declined to extend it to related risks that could well have been anticipated as likely to follow their violation." Fleming, p. 136; *cf.* Prosser, p. 158.

the Factories Act, 1937,[88] to fence dangerous parts of machinery for the protection of their employees. In a series of decisions interpreting this section the House of Lords has held: (a) that the legislature intended to protect employees against only the risk of injuries resulting from their bodies coming in contact with dangerous parts of unfenced machines; the legislature did not intend to protect employees against the risk of injuries from materials, on which they are working, being ejected from dangerous parts of unfenced machines;[89] (b) that the legislature did not intend to protect employees against the risk of injuries from flying pieces of dangerous parts of the unfenced machines themselves;[90] (c) that the legislature did not intend to protect employees against the risk of injuries resulting when tools that they are using come in contact with dangerous parts of unfenced machines.[91]

(3) *Strict liability.*

Where a court finds that a statute confers civil causes of action, the question whether the statute imposes strict liability is considered by the court to be a question of legislative intention.[92] Again, this is perhaps an inevitable consequence of the courts' pursuit of the fictional legislative intention to confer civil causes of action.

In *John Summers & Sons* v. *Frost*,[93] the plaintiff while grinding

[88] The relevant part of section 14(1) provides as follows: "Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced. . . ." This section has been prospectively repealed by, and replaced by section 14(1) and (2) of the Factories Act, 1961, with effect from April 1st, 1962. The new Act is a consolidating one, and the effect of section 14 remains unaltered.

[89] *Nicholls* v. *Austin (Leyton) Ltd.*, [1946] A.C. 493 (employee injured when a piece of wood on which she was working flew out of the circular saw she was operating); "The fence is intended to keep the worker out, not to keep the machine or its products in." *Ibid.*, at p. 505, *per* Lord Simonds.

[90] *Close* v. *Steel Company of Wales Ltd.*, [1962] A.C. 367 (employee injured when the bit of the drill of an electric drilling machine he was operating shattered, and a piece entered his eye).

[91] *Sparrow* v. *Fairey Aviation Co.*, [1962] 3 W.L.R. 1210 (employee injured when a tool he was holding came in contact with a part of the lathe he was operating causing his hand to strike the lathe. The tool came in contact with the dangerous part of the unfenced machine; his hand did not.) Several of their Lordships (Lord Reid, at p. 1216, Lord MacDermott, at p. 1221, and Lord Morris of Borth-y-Gest, at p. 1230) felt that no distinction could be drawn between an employee's body coming in contact with the dangerous part of an unfenced machine and his clothing coming in contact with the dangerous part. This point has not yet been decided.

[92] "One must always turn to the statute imposing the duty to discover against what types of conduct on the part of the defendant the plaintiff will be protected by an action in tort." Street, *op. cit.*, footnote 8, p. 283.

[93] [1955] A.C. 740 (H.L.).

a piece of metal injured his thumb when it came in contact with the grinding wheel. The House of Lords held that the exposed part of the grinding wheel was an unfenced dangerous part of a machine within section 14(1) of the Factories Act, 1937.[94] The defendant factory owner was held liable to the plaintiff despite a finding that to comply with the section would render the grinding wheel unusable; the duty of the defendant to fence the grinding wheel securely was absolute. In reaching this conclusion Lord Reid said:[95]

> For the appellants it was argued that "securely fenced" means fenced as securely as is possible without making the machine unusable. . . .
>
> My Lords, we are not entitled to ascertain the intention of Parliament from any other source than the terms of the Act. Before such a meaning could be attached to this section it would be necessary to hold that it is reasonably capable of being construed in this way. . . . So to interpret the section would not be construing the words of the section but adding to the section a qualification or proviso which is not there.

In *Brown* v. *National Coal Board*,[96] the legislation in issue was section 48 of the Mines and Quarries Act, 1954.[97] The appellant employee was injured when a stone fell from a roof of a road in the respondents' mine; the road was not "secure" within the meaning of section 48. The issue was whether the respondents' manager was in breach of his duty under the section to take "such steps . . . as may be necessary for keeping the road . . . secure." Lord Reid put the problem in this way:[98]

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[94] *Supra*, footnote 88.

[95] *Supra*, footnote 93, at pp. 769-770. Similar observations were made by Viscount Simonds, at p. 751, and Lord Morton of Henryton, at pp. 758-759.

In commenting on this case one writer said: "It is hard to imagine that Parliament really intended, when it passed the present Factories Act in 1937, and the previous legislation which it replaced, that so common a machine as a grindstone should become unlawful. . . . The object of the Factories Act is to protect the lives and health of workpeople, not to bring industry to a standstill." Williams, *op. cit.*, footnote 9, at pp. 237-238.

[96] *Supra*, footnote 58.

[97] The relevant parts of section 48 provide as follows: "(1) It shall be the duty of the manager of every mine to take, with respect to every road and working place in the mine, such steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the road or working place as may be necessary for keeping the road or working place secure. . . . (2) It shall be the duty of the manager of every mine to take such steps as may be necessary for securing that he is at all material times in possession of all information relevant for determining the nature and extent of any steps which it is requisite for him to take in order to discharge efficiently the duty imposed on him by the foregoing subsection."

[98] *Supra*, footnote 58, at pp. 586-587.

> My Lords, the appellant sustained injury caused by a fall from the roof of a road in the coal mine in which he was employed. He cannot now maintain that this was caused by any fault or negligence for which the respondents can be held liable to him. His case is that the bare fact that the fall occurred is sufficient to show that the manager was in breach of his duty under section 48 of the Mines and Quarries Act, 1954, to keep the road secure. He maintains that that section imposes an absolute duty on the manager. . . .
>
> Undoubtedly, if a manager fails to do anything which a careful and skilled manager in his shoes would have done, he will be in breach of his duty and his employers will be liable for any damage caused thereby. But the question in this case is whether the section goes further and imposes on him a duty to do things which later investigation may show were necessary but which neither he nor anyone else could know at the time were necessary — whether it requires him to do the impossible.

The House of Lords held that the manager of the mine was not under an absolute duty: therefore, since the manager had not been negligent, they held that he was not in breach of section 48 of the Mines and Quarries Act, 1954, and the respondents were not liable for the appellant's injuries.[99]

(4) *The tendency to disregard the statute if the defendant has not violated it.*

Another consequence of the courts' search for the intention of the legislature to confer civil causes of action is a judicial tendency to disregard a statute that has not been violated by the defendant in ascertaining the defendant's common-law negligence liability. In *Chipchase* v. *British Titan Products Co.*,[100] the plaintiff, an employee of the defendants, was injured when he fell from a staging on which he was working. The defendants had supplied the plaintiff with a plank nine inches wide to work six feet above the ground. A safety regulation[101] provided that a plank at least thirty-four inches wide must be supplied to those working more than six feet six inches above the ground. The plaintiff sued for breach of statutory duty and common-law negligence. His action for breach of statutory duty was withdrawn at the hearing before the

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[99] Lord Denning, although agreeing that the statute did not impose an absolute duty on the manager, and that the manager had not been in breach of his duty under the statute, expressed the opinion that the statute imposed a higher duty on the manager than the common-law duty to use reasonable care: *ibid.*, at pp. 595-596.

[100] *Supra*, footnote 82.

[101] Building (Safety, Health and Welfare) Regulations, 1948, reg. 22: "Every working platform from which a person is liable to fall more than 6 feet 6 inches shall be — . . . (c) at least 34 inches wide if the platform is used for the deposit of material;"

commissioner, because the defendant had not been in breach of the safety regulation: the staging from which the plaintiff fell was less than the minumun height dealt with by the regulation. In addition, however, the court refused to consider the regulation in dealing with the defendants' liability for common-law negligence: as a result the plaintiff's action for negligence failed.

The plaintiff had argued that, although the regulation had not been violated, it should be used by the court as an aid in establishing the standard of care in the negligence action; using such an aid, the argument went, the defendants should have supplied a plank wider than nine inches, and therefore the defendants were negligent.[102] In a short judgment rejecting this argument Denning L.J. said:[103]

> Mr. Stogdon argued that if the plaintiff had been working six feet six inches above the ground, he would by virtue of regulation 22 of the Building (Safety, Health and Welfare) Regulations, 1948, have had to have planks at least 25 inches wide; and, indeed, as he had a paint bucket up there beside him, the planks would have had to be 34 inches wide. Mr. Stogdon agrees that this case is not within the regulations because the plaintiff was not working six feet six inches but only six feet above the ground; but he argues that, as it was so nearly within the regulations, the court ought to take the regulations into account and hold that there ought to have been a plank wider than nine inches.
>
> I do not think that argument is correct. The commissioner was clearly right in saying that the common law claim must be considered independently of the regulations. Undue complications would be brought into these cases if, whenever the courts were considering common law obligations, they had to consider all the statutory regulations which nearly apply, but which in fact do not apply.

With respect, this approach seems wrong. Where a safety regulation provides standard precautions for work six feet six inches above the ground, those precautions should be relevant in deciding the precautions a reasonable man would take for work six feet above the ground. If a regulation says that it is unreasonable to provide a plank less than thirty-four inches wide when an employee is working more than six feet six inches above the ground, surely this is evidence that the provision of a plank nine inches wide for work six feet above the ground is also unreasonable.

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[102] The plaintiff was asking the court to interpret the common law of negligence in the light of the safety regulation; he was asking the court to determine the common law by analogy to the statute. As mentioned earlier, *supra*, footnote 74, it is unusual for a court to do this. See Fricke, *op. cit.*, footnote 9, pp. 253-254.

[103] *Supra*, footnote 82, at pp. 548-549; *per* Morris L.J., at p. 550. But *cf. Franklin* v. *Gramophone Co.*, [1948] 1 K.B. 542 (C.A.).

Thatcher v. *C.P.R.*[104] is an example of a sounder approach to the relevance in negligence actions of safety statutes that have not been violated by the defendant. The plaintiff was injured in a level crossing accident. In an action against the defendant railway, one of the jury's findings of negligence in the defendant's operation of the train was that the "speed was not being properly reduced with relation to the approach to a thickly populated area".[105] This finding was based mainly on a section of the Railway Act[106] which provided that no train should pass through "any thickly peopled portion of any city" at a greater speed than ten miles an hour. Although the train was travelling greatly in excess of ten miles an hour, the defendant was not in breach of this section, because the accident occurred outside of, though close to, a city. The jury concluded that the defendant's train was travelling too fast at the time of the accident; in reaching this conclusion they considered evidence showing that at the speed the train was then travelling the defendant could not have complied with the section of the Railway Act on entering the city. The Ontario Court of Appeal upheld a verdict based on the jury's finding.

In giving judgment for himself and Roach J.A., Laidlaw J.A. said:[107]

> It was urged by counsel in the court below and in this court that s. 309 of the Railway Act has no application and is not relevant to the facts in issue between the parties. . . .
>
> Counsel for the appellants argues that the section is not applicable because there is no evidence that the accident happened in a thickly peopled portion of a city, town or village. He also contends that the plaintiffs are not within the class of persons for whose benefit the section was passed. In presenting those arguments, counsel avoids the real ground upon which counsel for the plaintiffs puts their case. He does not suggest that the accident happened in a thickly peopled portion of the city of Guelph. He does not attempt to say that the defendants are liable by reason of a breach of the provisions of the statute. . . . He shows that by virtue of that provision the engineer of the train was under an obligation to have his train under such control and running at such speed that when he reached the eastern boundary of the City of Guelph, which is also the western boundary of the allowance for Victoria Road, he would not be travell-

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[104] [1947] O.W.N. 965 (Laidlaw and Roach JJ.A., Hogg J.A. dissenting).

[105] *Ibid.*

[106] R.S.C., 1927, c. 170, s. 309(a); now R.S.C., 1952, c. 234, s. 312(1)(a). It will be recalled, *supra*, footnote 62, that section 392 of the Railway Act, R.S.C., 1952, c. 234, expressly confers civil causes of action on persons injured by conduct involving breaches of the Act. The corresponding section in the 1927 revision is section 385.

[107] *Supra*, footnote 104, at p. 966; *cf. Littley* v. *Brooks*, [1930] S.C.R. 416, [1930] 4 D.L.R. 1; Morris, *op. cit.*, footnote 3, at pp. 466-467.

> ing at a speed greater than ten miles per hour. He then shows, from the evidence of the engineer, that the speed of the train when it reached Victoria Road was so great that the engineer could not possibly reduce it to the speed to which it was limited when it reached the westerly boundary of the road. The maximum speed at which the engineer was permitted by law to operate the train when it reached the west limit of Victoria Road was a fact which might properly be proved in support of an allegation of negligence on his part in the operation of the train immediately before he reached that place.

In his dissenting judgment Hogg J.A. said:[108]

> Any obligation arising from the provisions of s. 309 of the statute could relate only to persons who are in a thickly populated portion of a city, town or village, for they are the only persons within the ambit of the section. I am unable to hold that the duty imposed upon a railway company by this section of the statute can be so enlarged as to embrace a duty to persons with whom the section is not in any manner concerned.

It is submitted that the majority correctly framed the issue and that Hogg J.A. did not. The majority approach in the *Thatcher* case makes use, by way of analogy, of a statutory standard that is inapplicable to the facts of the particular case: the statutory standard is evidence of the common law standard of care. This is an approach which the English Court of Appeal refused to take in the *Chipchase* case.

IV. *Defendant's Breach of Statute Evidence of His Negligence.*

When will proof of the defendant's breach of a safety statute be merely evidence of his negligence, to be taken into account by the jury in arriving at the standard of care in a negligence action? As mentioned earlier,[109] the courts have tended to regard violations of motor vehicle safety statutes as merely evidence of negligence or at the most *prima facie* proof of negligence; the courts do not consider that motor vehicle safety statutes create civil causes of action in favour of persons injured by conduct involving their violation.[110] *MacInnis* v. *Bolduc*[111] is illustrative. The defendant's car skidded and swung across the highway in front of the plaintiff's car; the plaintiff was seriously injured in the resulting collision. The defendant, being on the wrong side of the road at the time of the accident, was in breach of two sections of the Nova Scotia Motor Vehicle Act.[112] The court held that proof that the defendant had violated the statute was *prima facie* proof of his negligence.

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[108] *Supra*, footnote 104, at p. 969.
[109] *Supra*.
[110] Cases cited, *supra*, footnote 55.
[111] *Supra*, footnote 55.
[112] R.S.N.S., 1954, c. 184, s. 94(1), and s. 97, as am. by S.N.S., 1958, c. 47, s. 17.

The court considered that, once the plaintiff had proved the defendant's breach of the statute, the burden shifted to the defendant to prove that he was not negligent in violating the statute. The procedural effect in the negligence action, of the plaintiff's proof of the defendant's breach of the statute, was equated with the procedural effect on the course of a negligence action of the maxim *res ipsa loquitur*, where that maxim is held to apply to a particular fact situation.[113]

The defendant in *MacInnis* v. *Bolduc* attempted to rebut the presumption of negligence by adducing evidence that his breach of statute resulted because his car skidded on the icy highway. The court held that, assuming this to be the explanation for his breach, it was insufficient to rebut the presumption of negligence. Doull J. said:[114]

> The *prima facie* proof of negligence arises from the fact that the vehicle is on the wrong side of the road in contravention of a statute. That *prima facie* proof is not rebutted by a "neutral fact" consistent with either negligence or care. . . .
>
> To prove that the car was on the wrong side of the road because of a skid does not prove anything [*sic*] in rebuttal of the presumption a skid is a "neutral fact".

There was no discussion in *MacInnis* v. *Bolduc* of the intention of the legislature to confer or not to confer civil causes of action when it enacted the Motor Vehicle Act.[115] The effect to be given to a breach of the statute in the negligence action was considered to be a matter for the court alone. As has been suggested before,[116] this would seem to be the best approach to all safety statutes, not only to those dealing with motor vehicles.

The action being between two car drivers, the statutory onus section, section 201, as amended by S.N.S., 1958, c. 47, s. 30, did not apply.

[113] Accord, *Gauthier & Co.* v. *The King*, *supra*, footnote 55 (Taschereau, Kellock, and Estey JJ., Kerwin and Rand JJ. dissenting).

In *MacInnis* v. *Bolduc*, *supra*, footnote 55, Doull J., speaking for himself, Parker, Currie, and Patterson JJ., felt that, quite apart from the defendant's breach of statute, the facts of the case gave rise to a *res ipsa loquitur* situation.

For the possible procedural effects to be given to the maxim *res ipsa loquitur* in a negligence action, see Wright, *Res Ipsa Loquitur*, in Special Lectures of the Law Society of Upper Canada (1955), p. 103.

[114] *Supra*, footnote 55, at pp. 26-27 (M.P.R.).

[115] Nor was there any such discussion in either *Gauthier & Co.* v. *The King*, or *Yager Builders Ltd.* v. *Bestway Express Ltd.*, *supra*, footnote 55. *Contra*, *Clarke* v. *Brims*, and *Phillips* v. *Britannia Hygienic Laundry Co.*, *supra*, footnote 55.

It is not clear why the courts, in dealing with motor vehicle safety statutes, either do not discuss the question of the intention of the legislature to confer civil causes of action, or if they do discuss it do not find it to exist. See Williams, *op. cit.*, footnote 9, at p. 247.

[116] *Supra*, and footnote 76.

It is not so clear, however, that the effect in a negligence action of a breach of every safety statute should be the same as that advocated in *MacInnis* v. *Bolduc* for the breach of motor vehicle safety statutes: that, once the plaintiff proves a breach, the burden is on the defendant to show that he was not negligent in violating the statute. The defendant's breach of certain safety statutes should be considered, perhaps, as merely evidence of the defendant's negligence: evidence to be accepted or rejected by the jury in their discretion, even in the absence of an explanation by the defendant. On the other hand, there may be certain safety statutes for whose breach the defendant should not be able to escape liability even by showing that he was not negligent.[117] Violations of such statutes would be negligence *per se:* the determination of the standard of care would be taken from the jury. There may even be certain safety statutes whose breach should be irrelevant in negligence actions.[118]

In some cases the courts should, perhaps, use certain safety statutes to create new duty relationships, where none existed at common law prior to the enactment of the statutes.[119] If this were done, a statute would be relevant in a negligence action not only in connection with the "negligence" issue, but also in connection with the "duty" issue.

In any event, the effect to be given in a negligence action to proof of the defendant's breach of a safety statute should always be a question of law for the court;[120] as mentioned earlier,[121] the court in deciding this question may be legitimately influenced, although not controlled, by the purpose of the legislature in enacting the particular statute.

Conclusion

The subject investigated in this article was the effect in a negli-

[117] See Prosser, pp. 158-159. [118] See, *supra,* and footnote 33.

[119] "As it is the court's function to determine when a relationship arises which may entail a duty on the part of one person so to act as to save another person from harm, in determining that duty problem the courts may be guided, although not necessarily controlled, by any legislation, whether of an authority having jurisdiction over civil rights or one which, as in Canada, has jurisdiction over criminal law." Note (1941), 19 Can. Bar Rev. 51, at p. 52, footnote omitted; see *Caime Fur Farms Ltd.* v. *Kokolsky,* [1963] S.C.R. 315, 39 D.L.R. (2d) 134; Morris, *op. cit.,* footnote 3, at pp. 467-470; Morris, The Role of Criminal Statutes in Negligence Actions, *op. cit.,* footnote 9, at pp. 21-27; Willis, *op. cit.,* footnote 74, at pp. 1144-1145. *Contra,* Fricke, *op. cit.,* footnote 9, at p. 265; Williams *op. cit.,* footnote 9, at pp. 256-257.

[120] Morris, *op. cit., ibid., passim*; Morris, The Role of Criminal Statutes in Negligence Actions, *op. cit., ibid., passim.*

[121] *Supra.*

gence action of proof by the plaintiff that the defendant had violated a statute. Three possible effects were suggested: that proof of the defendant's breach of a statute is irrelevant; that proof of the defendant's breach of a statute is conclusive proof of the defendant's negligence; or that proof of the defendant's breach of a statute is evidence of the defendant's negligence.

I suggested that only safety statutes should be relevant in negligence actions. It was suggested further that even some safety statutes, because of the unreasonableness of the standard of care that they require, should be disregarded in negligence actions.

A good part of the article was allegedly concerned with situations in which proof of the defendant's breach of a safety statute was conclusive proof of his negligence: situations that gave rise to the negligence *per se* rule. I say allegedly concerned advisedly, because the received doctrine is that the negligence *per se* rule depends on the intention of the legislature to confer civil causes of action. The received doctrine thus goes further than merely establishing the conclusive standard of care in negligence actions; when the court finds that the legislature intended to confer civil causes of action, the result of this finding is that the plaintiff has an action on the statute, distinct from the common-law action for negligence. Apart from constitutional limitations, this result is unobjectionable if the legislature has expressly conferred civil causes of action on persons injured by conduct involving a breach of the statute. What is objectionable is a court manufacturing a legislative intention to confer civil causes of action, despite the silence of the legislature on the civil consequences of a breach of the statute.

The main objection to courts manufacturing nonexistent legislative intentions is the difficulty of discovering the bases on which they either find or refuse to find these fictional intentions.[122] The courts would like to blame the legislatures for this difficulty. Thus it has been said:[123]

> To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be. There are no doubt reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what those reasons may be.

[122] See Fleming, pp. 132-133.

[123] *Cutler* v. *Wandsworth Stadium Ltd.*, [1949] A.C. 398, at p. 410 (H.L., *per* Lord du Parcq).

> I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned.

The courts cannot escape responsibility for a difficulty of their own making by such platitudes.[124]

The search for a fictional legislative intention to confer civil causes of action impels the courts to pretend that the legislatures control the effect of legislation on civil liability. In reality, of course, the courts control the effect of legislation on civil liability, where the legislature is silent on the civil consequences of a breach of statute.[125] The pretence is taken for reality, however, and a number of consequences usually follow a court's discovery of the fictional legislative intention to confer civil causes of action: the plaintiff is considered to have an action on the statute; the persons who can complain of a breach of the statute, and the kind of harm against which they can claim protection, are considered to depend on the intention of the legislature; whether the statute imposes strict liability is also considered to depend on the intention of the legislature; if the defendant has not violated the statute the court is likely to disregard it in determining his common-law liability.

These consequences are in many respects unfortunate. In particular, they generally result in a refusal by the courts to use statutes by way of analogy in common-law negligence actions. If the defendant has not violated the statute, or if the plaintiff cannot bring himself or his injury within the class or type of harm that the court finds the legislature contemplated, the court will generally ignore the statute in determining the defendant's common-law negligence liability. In many cases such a statute should be relevant in determining the defendant's liability for negligence.

I am of the opinion that since the courts really control the effect of legislation on civil liability, they should discard their fictional search for legislative intention. In each case the courts should decide what effect is to be given to a breach of a safety statute in a negligence action. In some cases a breach of a safety statute should be irrelevant; in others it should be conclusive of the defendant's negligence; in others it should be presumptive proof of the defendant's negligence; and in still others it should be merely evidence of that negligence. In certain circumstances,

[124] See Williams, *op. cit.*, footnote 9, at p. 233.

[125] See Fleming, p. 132; Prosser, pp. 160-161; Street, *op. cit.*, footnote 8, p. 273; Note (1941), 19 Can. Bar Rev. 51, at p. 54; *cf. O'Connor* v. *S. P. Bray Ltd.*, *supra*, footnote 49.

the courts should use a statute by way of analogy to create a new duty relationship, where none exists at common law. In determining the effect to be given to a safety statute in a negligence action, the courts should be influenced, but not controlled, by the purpose of the legislature in enacting the statute—in particular by the class of persons and the type of harm that the legislature contemplated.

It is safe to say that the courts are unlikely to discard their traditional approach to statutes.