

convenience of administration would be sufficiently increased nor difficulty of proof sufficiently obviated to justify the imposition of absolute liability in a situation such as this where grave injustice could easily result. But, even if the court is correct in its interpretation of the Minnesota statute, there is no compelling reason for the court to hold that a criminal statute of the absolute liability type is applicable at all in a civil action. As Professor Clarence Morris has indicated, only those criminal statutes which are founded on a wrong-doing theory should be considered applicable in a civil case unless some other reason exists for shifting the loss.<sup>13</sup> No such reason is apparent here.

The Minnesota court also indicated that there could be liability on these facts even in the absence of the statute, i.e., liability based on common law negligence. It is difficult to find any foreseeable risk of harm to any person merely from overloading the cars or from failing to remove the drippings as often as they could have been removed. In the absence of foreseeability of some harm to some person, it would seem that the conduct could not be characterized as negligent.<sup>14</sup>

Since the statute does not seem to be one which results in criminal guilt in the absence of a showing that the actor intended to deface a sign, and since, even if the court were correct in construing the statute as one imposing liability on the basis of conduct alone there is no compelling reason for applying such a statute in a civil case, it is submitted that the court erred in allowing the jury to find negligence based on a breach of the statute. It also appears that since there is no foreseeability of any harm to any person, the court was in error in saying that common law negligence could be found.

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TORTS-VIOLATION OF CRIMINAL STATUTE AS NEGLIGENCE *Per Se*  
OR MERE EVIDENCE OF NEGLIGENCE

Defendant's truck-driver was driving along the highway with the intention of turning left at an intersection. He failed to yield the right of way to the plaintiff who approached from the

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13. Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COL. L. REV. 21 (1949).

14. PROSSER, TORTS 341 (1941).

rear at a higher rate of speed. The defendant's driver then turned left without moving into the proper lane or giving the proper hand signal, and struck the plaintiff who was passing at the intersection. Regulatory traffic statutes provided for criminal liability for each of these acts: failing to yield the right of way to a passing car, turning from an improper lane, turning without proper hand signals and, on the plaintiff's part, passing at an intersection. The court held that the violation by the plaintiff was sufficient to bar his recovery, denominating such a violation negligence *per se*. The court further held that it was clear that the plaintiff's negligence in this respect contributed to the injury as a proximate cause of the collision and its consequences.<sup>1</sup>

The case poses the problem of whether the violation of a criminal statute which does not provide for civil liability should, of itself, constitute negligence in a civil action. The courts are in complete disagreement on the question. A majority of the jurisdictions holds that the violation of such a statute is negligence *per se*,<sup>2</sup> with a strong minority holding that such a statutory violation is evidence of negligence only.<sup>3</sup>

In an ordinary negligence action, where the violation of a statute is not involved, the question of whether the actor was negligent is presented to the jury as though that question required the determination of but one issue. The court instructs the jury that negligence is the term used to describe conduct which, though engaged in without the intent to harm another, does subject that other to an unreasonable risk of harm.<sup>4</sup> The court further instructs the jury in terms of the reasonable man of ordinary prudence, who always acts so as not to subject others to an unreasonable risk of harm. The jury then determines what the reasonable man would have done under the circumstances of the case, or, in other words, the jury determines the particular standard of care required. It then compares the conduct in question with that of the reasonable man in order to determine whether the actor is negligent. The

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1. *Cole v. Fletcher Lumber Co.*, 230 N.C. 616, 55 S.E.2d 86 (1949).

2. *Morris*, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933). For approval of this position see Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

3. For a defense of this position, see Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932).

4. PROSSER, TORTS 176 (1941).

entire negligence question is thus left to the jury in the ordinary case, and, in general, is considered as though it were one issue.

Mr. Justice Holmes pointed out<sup>5</sup> that, in reality, the question of whether the actor was negligent involves two separate and distinct issues. The first of these is the so-called "factual" sub-issue, and it involves only the question, sometimes a complex one, of what the actor in fact did. That issue obviously requires only a factual determination of the type ordinarily entrusted to juries. The second issue is the so-called "ethical" sub-issue, and that involves a particularization of the general standard of due care to meet the circumstances of the case. That determination obviously involves a value judgment which in effect "makes" the substantive law insofar as the particular case is concerned. In other situations, the answering of such questions is conceived of as being a function of the court and not of the jury, and it is properly labeled a "question of law." It was Holmes' position that in negligence cases the jury should decide only the factual sub-issue, and that the ethical sub-issue should be determined by the court.<sup>6</sup>

Holmes' theory has not received wide acceptance in the courts. There are, however, at least two instances where that general result is reached. In cases where the trial judge finds that the question of whether the conduct of the actor fails to come up to the reasonable man standard is one on which reasonable men cannot differ, he so instructs the jury. This is an instance of the court's deciding the ethical sub-issue, for the court, allowing for all reasonable variations in the standard the jury might establish, finds, "as a matter of law," that the actor's conduct does not measure up to that standard, whatever it might be.<sup>7</sup>

The second group of cases, of which the principal case is one, consists of those cases where the violation of a statute is held to be negligence as a matter of law. In cases of this sort, however, the Holmesian approach is followed in part only, that is, the jury decides only the factual sub-issue, but the standard is set primarily by the legislature, with the judge's function being only negative. Under the existing choices, the

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5. HOLMES, *THE COMMON LAW* 120-129 (4th ed. 1938).

6. *Lorenzo v. Wirth*, 170 Mass. 596, 49 N.E. 1010 (1897); but compare the dissenting opinion by Knowlton, J., *id.* at 601, 49 N.E. at 1011.

7. PROSSER, *TORTS* 279 (1941).

judge may accept the legislative standard as the proper one, or he may leave the value judgment for the jury. In the principal case, the court held that the ethical sub-issue had been decided by the legislature, leaving only the factual sub-issue to the jury.

In the majority of jurisdictions, the judge is required to rule that the violation of the criminal statute is negligence *per se* on the theory that the legislature has, by forbidding certain acts, made absolute the standard of care required, and any violation of the statute is deemed to be inconsistent with the minimum degree of care which the legislature established.<sup>8</sup>

Professor Clarence Morris has attacked the *exclusive* use of the negligence *per se* doctrine.<sup>9</sup> He reasons that compensatory damages in tort cases are for the purposes of "making the plaintiff whole again," but that there should always be some reason for the reparation. In other words, there should not be liability without fault unless the imposition of such liability is explainable in some manner. Since some statutes are not based on any wrong-doing theory, and since conduct which is usually undesirable may, at times, be innocent, the negligence *per se* doctrine may result in the imposition of liability in situations where the actor is neither at fault nor otherwise deserving of admonition, and is no better able to bear or distribute the loss than the injured party.

The courts have seemingly taken the position that the only alternative to strict adherence to the negligence *per se* doctrine is the complete abandonment of it. Such abandonment results in the minority view that the legislature, in enacting a criminal statute for the purpose of preserving the peace or of protecting life and limb, does not intend to change the common law duty of due care under the circumstances, and, therefore, that a violation of such a statute is only evidence of negligence. And they have further said that since the legislature has established no new duty, the violation of a statute is of no more weight than any other evidence of negligence. Professor Morris disapproves of strict adherence to that doctrine also.<sup>10</sup> He points out that since the determination of the ethical sub-issue is so often left to the jury with no other instruction than a definition

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8. PROSSER, *TORTS* 265 (1941).

9. Morris, *supra* note 2; Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 *COL. L. REV.* 21 (1949).

10. *Ibid.*

of the reasonable man, the jury is likely to disregard the studied conclusion of the legislature which is presumably more experienced in laying down standards in situations where the legislative standard is the appropriate one.

In the *Restatement of Torts* the American Law Institute has adopted the negligence *per se* theory of the effect of statutory violation.<sup>11</sup> It is interesting to note that in Comment c to Section 286, the restaters have answered many of the objections raised by Professor Morris to the strict adherence to the negligence *per se* doctrine. But there still remain those statutes which are not based on any wrong-doing theory. In those instances, there might clearly be criminal liability and still be no sound reason for imposing civil responsibility.

Professor Morris suggests that the best solution to the conflict is to take the best of each; to allow the court, in cases where it decides that the legislative standard is the correct one, to take it as being determinative of the ethical sub-issue. The court should state in the instructions to the jury that the standard of care is such and that any deviation therefrom will result in liability. This may be done with or without reference to the statute involved. In all cases where the court does not feel sure that the standard set forth by the legislature is the proper one for the determination of the ethical sub-issue of negligence in a particular case, it should be free to state that the standard is due care under the circumstances and that the violation of the statute may be considered as evidence of negligence in determining the issue.

By giving the courts this freedom to choose between inconsistent theories upon the exercise of sound discretion, the best elements of each doctrine are preserved. The doctrine of negligence *per se* is preserved in those cases where the court feels that the ends of justice can be obtained and the futility of submitting a question to the jury on which reasonable men cannot differ is avoided. On the other hand, the weaknesses of the negligence *per se* doctrine can be remedied by submitting cases of statutory violation, where the court is not satisfied that the legislative standard is the proper one, to the jury for a determination of the ethical sub-issue as well as the factual one.

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11. RESTATEMENT, TORTS § 286 (1934).

These theories and principles, which often present hard problems when applied to individual cases, offer little room for conflict when applied to the principal case. Here the plaintiff's actions were clearly proximate as opposed to remote causes of the collision and damages. There was no showing of emergency or other excuse which prevents plaintiff's conduct from being blameworthy. The legislative enactment was for the purpose of warning against and preventing just such accidents as here occurred. So, there being no question as to the wisdom or applicability of the statute, the negligence *per se* rule as applied by the court was correct and appropriate. However, should the case have arisen in a jurisdiction which follows the evidence of negligence doctrine, the court would have submitted the issue to the jury with instructions to the effect that the violation of the statute should be considered as evidence of negligence. From the reported facts, there is no indication of any factor which would lead the jury to a verdict inconsistent with the one reached by the court. The jury, in setting up a standard of its own, would most likely find due care under the circumstances to be quite similar to the standard laid down by the legislature. And it, too, would find that the plaintiff's actions did not measure up to the standard. But it would not have to do so.

One question in this field which does not seem to have been touched upon by previous writers is whether the violation of the statute must be established beyond a reasonable doubt, as is required in a criminal case under the same statute, or whether a mere preponderance of evidence as in other civil cases is sufficient. It would seem that at least in jurisdictions where the negligence *per se* doctrine prevails, that the violation should be proved more clearly in cases where there is some doubt as to the applicability of the statute.

The negligence *per se* doctrine is of great merit in many cases. Its major defect is compulsory adherence in cases where it is inapplicable. The ethical sub-issue of negligence should be decided by the judge, at least to the extent that he should decide whether the standard of conduct prescribed by the legislature is applicable in the particular case. If he is not clearly convinced that the standard so set out should be applied, he should be allowed to submit the cause to the jury with instructions which permit it to determine the standard to which to apply the facts, in determining liability.

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