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Breach of Criminal Licensing Statutes in Civil Litigation

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BREACH OF CRIMINAL LICENSING STATUTES IN CIVIL LITIGATION

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I.

One of the important bases of civil liability in our times is the violation of criminal statutes. This is so, in spite of the fact that most of these statutes make no provision at all for civil liability. There are literally hundreds of statutes on our books obviously intended to prevent the occurrence of specific extra-hazardous conduct. While most of them simply forbid the conduct in question or make it punishable by fine, at least when it is done in certain areas and under certain conditions,[1] some of them expressly include provisions attaching civil liability for damage caused by their breach. A few state that engaging in certain conduct, without observance of the conditions specified, amounts to the commission of a nuisance[2]—apparently implying that liability will automatically follow for damage occurring when these conditions have been ignored. Indeed, it seems to be an equally fair implication from such statutes that damage occurring when the stipulated conditions have been observed is not actionable in the absence of negligence.[3] In addition to these, there are, of course, other statutes which do not forbid engaging in any conduct at all but simply impose liability for all harm caused by engaging in certain conduct or by certain hazards connected with such conduct, regardless of the absence of fault.[4]

This brief article is intended to deal only with statutes whose breach, whether correctly or incorrectly, is analogized to negligence, with particular emphasis on violations of licensing statutes. Everyone is familiar with the leading cases in this general field and with the outstanding articles by Thayer, Lowndes and Morris, dealing with this subject.[5] While a great debt is due the learned authors for much that is helpful in their treatments, it can be said that they have placed insufficient

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* See Contributors' Section, Masthead, page 688, for biographical data.

1 *E.g.*, VT. PUB. LAWS § 8724 (1933), as to which see also Exner v. Sherman Power Construction Co., 54 F. 2d 510 (2d Cir. 1931).

2 CALIF. PUBLIC RESOURCES CODE c. 3, § 3600 (Deering 1939), passed apparently as a sequel to Green v. General Petroleum Corp., 205 Cal. 328, 270 Pac. 952 (1928).

3 See Exner v. Sherman Power Construction Co., 54 F. 2d 510 (2d Cir. 1931).

4 *E.g.*, OHIO GEN. CODE ANN. § 8970 (1938).

5 Thayer, *Public Wrong and Private Action*, SELECTED ESSAYS ON THE LAW OF TORTS 276 (1924), originally appearing in 27 HARV. L. REV. 317 (1914); Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Morris, *Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COL. L. REV. 21 (1949).

analytical emphasis on the breach of licensing statutes. Indeed, it is the analysis of this aspect of the subject in general which affords most handily a perspective on the proper use of violations of criminal statutes as the basis of civil liability in tort.

The present author has always felt that it is a great mistake to consider at all the breach of a criminal statute in imposing civil liability in tort, unless the statute expressly provides for such liability. The only excuse for proceeding contrariwise is that a refusal to do so occasionally creates a paradoxical situation which is impossible to reconcile with the general principles of the law of negligence. In order to avoid any such paradox, therefore, the author rather reluctantly concedes that it sometimes becomes absolutely necessary to regard the breach of a criminal statute as a basis of civil liability. What is referred to, of course, are statutes which establish a standard of care for more or less routine conduct—what might be called "safety statutes."

In administering the law of negligence we use the "reasonable and prudent man" standard to guide the trial court in its determinations of whether or not to submit certain cases to the jury. Such cases as are submitted to the jury are accompanied by charges exhorting the jurors to consider the evidence concerning the negligence issue on the basis of the same standard. Indeed, when the only issue before an appellate court is whether or not the trial court was right in submitting the case to the jury at all on the basis of the evidence of negligence adduced, the appellate court must also seek recourse to this standard. In each instance a process of evaluating human conduct occurs. That evaluation is conducted on the basis of familiarity with more or less normal human experience. The trial judge refuses to let the case go to the jury at all if, in his opinion, twelve laymen could not reasonably disagree among themselves that the defendant's conduct was not negligent. When the plaintiff assigus as error on appeal the trial court's direction of a verdict for the defendant on this ground, the appellate court has to go through the same process of evaluating human conduct on the basis of their notions (quite often vicarious) of human experience.[6] If they allow the appeal, it is because they disagree with the trial court's evaluating process. And the same phenomenon is involved if the trial court does let the case go to the jury and the defendant appeals from judgment entered on the verdict for the plaintiff on the ground that it was error to submit the question of negligence to the jury in the first place. Here, often enough, the appellate court may agree with the defendant that no jury of laymen could reasonably infer that the conduct in issue was

[6] See opinion of Palles, C. B., in Sullivan v. Creed, [1904] 2 Ir. R. 317.

negligence; and if it does so, it reverses the trial court with an order to direct a verdict for the defendant.

Some very amusing cases have arisen in this connection, one of the most striking of which is *Bennett v. Illinois P. & L. Corp.*[7] There a power company had been stretching wire along a road and had left a huge wire spool standing alongside the roadway, just off the line of travel. Plaintiff's horse was frightened by the spool and ran away, the plaintiff sustaining damage as a consequence. The only issue involved was whether or not the defendant had been negligent in leaving the spool where it was. The trial court apparently thought a jury of laymen might reasonably so conclude and let the case go to the jury, which brought in a verdict for the plaintiff, judgment being entered thereon. At any rate, the case was finally disposed of by the Supreme Court of Illinois, its 4-3 decision holding that the case was improperly submitted to the jury. Of course, this seems ridiculous at first blush, for if three out of seven state supreme court judges are of the belief that a jury of laymen might reasonably draw the inference that the defendant had been negligent, then one would suppose off hand that the matter was properly left to the jury in the first place.

But that is not true at all. Paradoxical as this decision may seem, it is absolutely defensible.[8] The state supreme court is not acting as a jury of laymen. It is, rather, making the last guess on whether or not the evidence of alleged negligence would justify the inference by a group of laymen that the defendant's conduct actually had amounted to negligence or, put another way, of whether or not a group of laymen could reasonably differ among themselves over this same matter. This guess is a terribly important judicial function—of the very essence of the administration of the law of negligence. Indeed, the determination of this issue at the judicial stage is usually called an "issue of law," although a little clear thinking will reveal that it is simply an evaluation process no different from that which the jury indulges in when it is permitted to do so. What really distinguishes the judicial function in dealing with the simple negligence issue is the realization that it is not safe to let all simple negligence cases go to the jury because of the realization that jurors' collective reactions are apt to be based on such psychological factors as sympathy, the color of the female plaintiff's hair, the fact that the defendant is a "big corporation," and the like. Only when the "professionals" involved believe that the evidence ad-

[7] Bennett v. Illinois P. & L. Corp., 355 Ill. 564, 189 N. E. 899 (1934).

[8] See Seader v. City of Philadelphia, 357 Pa. 369, 54 A. 2d 701 (1947), noted in 9 U. OF PITT. L. REV. 139 (1947); Ferguson v. Seattle, 27 Wash. 2d 55, 176 P. 2d 445 (1947).

duced could reasonably support the inference of negligence (regardless of what ultimate inference these "professionals" themselves might draw, were they sitting on the case without a jury) should they let the case be finally disposed of by the "tyros." Then whatever the jury does—and for whatever reasons—the judges can salve their consciences with the knowledge that the evidence could reasonably be interpreted to support the inference of either negligence or no negligence.

In the *Bennett* case the four judges constituting the majority of the Illinois Supreme Court apparently were convinced that a miscarriage of justice would occur if a jury were permitted to conclude that the defendant's conduct in that case was actionable negligence. Another way of saying this is that they were convinced, as professional and experienced jurists, that the defendant's conduct was not sub-standard conduct and that no group of laymen in the jury-box should be permitted to conclude otherwise. The three dissenting judges differed from them in only this respect—that, on the basis of *their* professional experience and observations, this conclusion was not so obvious. Their dissent did not necessarily mean that if they had been in the jury-box, or if they were acting as judges without a jury, they would have drawn the inference that the defendant was negligent. Far from it. All they meant was that they, as professional jurists, could not be sure that the inference of negligence would be unreasonable. Here was an honest difference of opinion among the professionals of last resort, distinguishable from the 5-4 decisions of the United States Supreme Court only by the fact that this evaluation process occurred at a relatively uncomplicated and lowly level—one not charged with grave social and political considerations.

II.

What has the foregoing discussion got to do with the breach of criminal statutes as the basis of civil liability? It has plenty to do with it, because it sets forth the *only* area of civil litigation in which criminal statutes should have any bearing whatsoever, at least when such statutes do not specifically provide for civil liability. It is only when a criminal statute provides a standard of conduct—a way of doing what the defendant did or failed to do in any particular case in question—that a court should permit its breach to be considered as a basis of civil liability at all. Indeed, one might go further and say that in such an instance, the court *must* take the breach of statute into account, because to do otherwise would involve the litigation in hopeless contradictions of principle under our established law of negligence. Again (repeating the caveat once and for all), always assuming that what is

said here applies only to criminal statutes which do not contain specific provisions allowing for civil liability.

The best illustration of what is meant can be shown by reference to a leading case in this field.[9] A state statute required druggists who sold poisonous drugs in bottles to place thereon labels containing the word "Poison" and showing the symbol of a skull and cross-bones. Because the defendant druggist failed to comply with this statute, the plaintiff's intestate ingested some of the unlabelled poisonous drug, confusing it with some innocuous medicine he intended to take, and died as a result. In his action against the druggist, the plaintiff assigned the defendant's breach of the criminal statute as the basis of civil liability. The Minnesota court made it clear that this was an ordinary negligence action and not an action authorized by statute or based in any way on the statute so as to make it other than a simple common-law action. It did say—rather unfortunately—that the statute, instead of the common law, fixed "the measure of legal duty." Had it left the matter there, the court would have introduced an element of confusion which would be most misleading, for the factor of duty in negligence litigation is certainly not involved in these breach of statute cases. Fortunately it transpires that all the court meant by the term "duty" was that duty of care of which negligence is so frequently said to be the breach. Those of us who realize that defining negligence as the breach of a duty of care is a futile and meaningless verbalism, are not seriously upset by this usage.[10]

But the Minnesota court then made it clear that the only real difference between the druggist's case as it actually came up, and what it would have been in the absence of the statute, was the source of the standard of care to be employed in determining whether or not the defendant's omission was sub-standard or negligent. In either event, the plaintiff's action would be a simple, common-law negligence action, in the one case the standard of evaluating the defendant's conduct being the statute with its legislative standard, and in the other, the common-law standard of the reasonable and prudent man, with all that that loose standard implies. As the court put it, defendant's non-compliance with the statutory standard was negligence *per se*; and we all know that in the absence of the statute, the same conduct would very likely have required the verdict of a jury in order to be labelled negligent, with the additional possibility that the trial court might (1) have directed a

[9] Osborne v. McMasters, 40 Minn. 103 (1889).

[10] Terry, *Negligence*, SELECTED ESSAYS ON THE LAW OF TORTS 261 (1924), originally appearing in 29 HARV. L. REV. 40 (1915).

verdict for defendant on the grounds that there was no evidence of negligence, (2) have set aside a verdict for defendant as contrary to the weight of the evidence and directed one for the plaintiff, or (3) have entered judgment on the jury's verdict for the defendant.

The statute in this case changes the situation entirely. Here the court is virtually obliged to use the breach of statute as the basis of civil liability. For whether or not the druggist was negligent depends upon whether or not his conduct came up to the prevailing standard of care under the circumstances. Now, if the court ignores the statute, then due care under the circumstances can be determined only by recourse to the evaluating process discussed above, where the court and jury cooperate in setting the standard on the basis of normal community conduct and adjudge the defendant's behavior accordingly. The result of such a process may be the conclusion that the conduct in question was not sub-standard or negligent; and in a similar case thereafter, another jury might conclude otherwise or, for that matter, reach the same conclusion. Moreover, how the same or different trial judges might react to these verdicts is anybody's guess. But such a situation is an absurd paradox, where the conduct in question has already been officially declared sub-standard and criminal by the highest legal agency in the state. Under such circumstances there is not only no need to resort to the common-law evaluating process but there is a compelling reason for not doing so—that is, that the court or the jury might set another standard in conflict with that already set by the legislature.[11] This picture of a common jury competing successfully with the legislature in establishing the prevailing norm of approved conduct is, of course, too ridiculous to be tolerated. Hence, if the evidence indicates that the druggist violated the statute and that such violation was the cause of the harm in suit, then the druggist *is* negligent and, if a causal connection is shown, liable.

However, the whole matter is not quite as simple as this, although the druggist case discussed above is hardly more complicated. Theoretically, in every case where breach of a criminal statute is assigned as the equivalent of negligence in a civil action for damages, there are other inquiries to make before one can be sure that consideration of the breach of statute is appropriate at all. After it is agreed that the statute is a safety statute—one which sets a standard way of doing a certain thing or which forbids the doing of something in a certain way—the court must make certain determinations. First, it must ascertain what the purpose of the statute is—what the legislature "intended"

[11] Thayer, *supra* note 5, at 281.

when it passed the act. What risk or hazard was it trying to avoid? Suppose it declared that sheep may not be freighted on board a ship unless they are put into small pens, say, six in each. A shipping line ignores this statute, so that, when the ship wallows in a stormy sea, the sheep are hurled the breadth of the boat, from one side to the other and back, to their damage. Observance of the statute would have prevented this. But it is well-understood that the purpose of the statute was to prevent the spread of disease throughout the entire flock.[12] Thus, if a disease broke out among those in one pen, they could be isolated or destroyed and the balance of the sheep might be saved. Since the hazard against which the statute was enacted is not the one which ensued, breach of the statute becomes immaterial and the shipping company's conduct can be held negligent, if at all, only in accordance with the common-law standard. In the druggist case discussed above, however, the hazard which ensued was obviously the one which the legislature had hoped to prevent by observance of the statute.

Second, the court must ascertain what interest the legislature intended to protect—whom it proposed to benefit, in what way—by observance of the statute. This is a double-barrelled inquiry. Some statutes have been held to have been passed for the benefit of the public in general and not for the benefit of particular individuals. The classical instance is the statute requiring adjacent landowners to shovel the ice and snow off the public sidewalks in front of their houses and stores.[13] Persons who have been hurt through non-observance of such statutes have been told that these acts were not passed for their benefit but were designed to relieve the public treasury from the expense of removing the ice and snow. A more understandable illustration—one unfortunately not involving the occurrence of inadvertent harm and, hence, not really appropriate in a discussion of negligence *per se*—appears in connection with statutory rape and abortion. A statute declares that a girl under 18 cannot consent to sexual intercourse. One who nevertheless does so may turn around and recover damages against her seducer, free from the defense of consent. But if the same girl had become pregnant and had been persuaded by her seducer to undergo an abortion, illegal by statute, she could not recover damages for the battery involved in an action against her seducer and the doctor. While the former statute was for her benefit, the latter was passed out of deference to the public's interest in the future of the race.[14]

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12 Gorris v. Scott, L. R. 9 Exch. 125 (1874).

13 See Thayer, *supra* note 5, at 288. See also Kirby v. Boylston Market, 80 Mass. 249 (1860).

14 Herman v. Turner, 117 Kan. 733, 232 Pac. 864 (1925).

Another example of the interest to be protected occurs in connection with statutes requiring railroads to fence their rights of way in rural districts. The purpose of such statutes is generally conceded to be to protect the interest of adjacent farmers' cattle and horses—to keep them from being run down. Where the absence of such a statutory fence was shown to have resulted in the death of a farmer's small son, who crawled onto the tracks and was hit, the New York court held that the plaintiff could not rely on the breach of statute as a basis of liability.[15] The reason it gave was that the legislature had intended to protect only the adjacent property owners' interest in live stock and not human personality interests.

What the court would have done had the farmer's son been hit while he was trying to drive cows off the railroad tracks remains a matter of conjecture, as to which interesting speculations might be raised on the basis of Cardozo's opinion in *De Haen v. Rockwood Sprinkler Co.*[16] There he stated that the legislative purpose underlying a criminal safety statute may be determined not alone on the basis of what precise hazard the legislature actually had in mind to avoid but also on the basis of what the court believes it might have intended had the particular situation which arose been called to its attention. He was dealing with a statute which prohibited leaving unfenced work elevators on construction jobs, the legislature having intended thereby to avoid the hazard of workmen falling down the shafts. But in the case before the court a steam radiator, left near the edge of the shaft because of the absence of the statutory fence, fell down and hit a workman ascending in the elevator. Cardozo declared that had this hazard been called to its attention, the legislature would surely have agreed that it was also within the scope of the statutory rule of protection. Hence, a court should liberally interpret the legislative intent to make it include the avoidance of situations not specifically foreseen but closely allied to those which the legislature had actually intended to cover.

In any event, after the court is satisfied that the statute is a safety measure designed to prevent the hazard which occurred and to protect the interest affected from the damage sustained, it must be satisfied that there is evidence indicating that the breach of statute is a causal factor in bringing about the plaintiff's harm. While this matter of causal connection is exceedingly simple, many courts have introduced needless complications in handling it. Thus, they have kept cases from the jury by declaring that the breach of statute was a mere "condition" and not

[15] Di Caprio v. New York Central Ry., 231 N. Y. 194, 131 N. E. 746 (1921).
[16] 258 N. Y. 350, 179 N. E. 764 (1932).

a "cause" of the plaintiff's damage, when proper analysis reveals no justification for using the language of cause at all. An instance is the breach of a parking statute, where defendant left his car parked in a certain place beyond the time allowed and plaintiff non-negligently collided with it.[17] The proper answer to the plaintiff is that if defendant's car were not there at the time, someone else's car might lawfully have been there, and that the purpose of the statute was not to keep open the spot in question but merely to serve the convenience of other would-be parkers of automobiles. The same is true of cases where a train remains on a railroad crossing beyond the statutory time. The purpose of that statute is not to prevent collisions with the train by automobiles approaching the crossing but is to prevent delays caused to automobilists using the road, although conceivably it might be held to mean the avoidance of the normal incidence of congested road traffic, including collisions between automobiles resulting therefrom.[18]

III.

Certainly enough has been said to reveal the part ordinarily played by the breach of criminal safety statutes in civil negligence litigation. At this time let us shift attention to a particular type of criminal statute—those imposing a penalty for engaging in certain conduct without a license to do so, although not at the same time expressly providing for a civil action for damages occurring during the course of the unlicensed activity. One of the most important of these cases is *Brown v. Shyne*.[19] There a New York statute made it a misdemeanor to practice medicine without a license; but it made no provision for civil actions against those who violated the statute. The defendant, who was unlicensed to practice medicine, gave the plaintiff chiropractic treatment and the plaintiff sustained harm as a consequence. In her suit for damages against the defendant the case was submitted to the jury on two theories—one for negligence amounting to ordinary malpractice and the other for negligence arising from breach of the statute, the trial court instructing the jury that it could regard the fact that defendant was unlicensed as evidence of negligence. From a verdict and judgment for the plaintiff the defendant appealed.

The Court of Appeals, through Judge Lehman, held that the instruc-

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

[18] Compare Patterson v. Detroit, L. & N. R.R., 56 Mich. 172 (1885) and Hendley v. Chicago & N. W. Ry., 198 Wis. 569, 225 N. W. 205 (1929). See also Missouri, K. & T. R.R. v. McLain, 74 S. W. 2d 166 (Tex. 1934), with which compare Pennsylvania R.R. v. Huss, 96 Ind. App. 71, 180 N. E. 919 (1932).

[19] Brown v. Shyne, 242 N. Y. 176, 151 N. E. 197 (1926).

tion, based on the breach of the licensing statute, was reversible error, Judge Crane vigorously dissenting. Judge Lehman observed that the jury's verdict was consistent with the finding that breach of the licensing statute was the sole evidence of negligence. Furthermore, he did not think that there was any logical connection between the failure to have a license and the malpractice alleged, any more than the having of a license would serve as proof that there had been no negligence at all. As an additional reason for the majority decision, Judge Lehman pointed out that the licensing statute was a measure enacted for the benefit of the public at large and was not passed for the protection of individual interests against any particular hazards.

Judge Lehman did not comment on the fact that the trial court had talked about breach of the statute as merely evidence of negligence—no doubt because he regarded any mention at all of this particular statute as incorrect in a civil action. However, it should be mentioned in passing that whenever a breach of criminal statute is appropriately used as the basis of liability in a civil action, then breach of that statute should be regarded as negligence *per se*—in itself—and not merely as evidence of negligence. For if it is regarded as merely evidence, then the jury is placed in a position to conclude that conduct which the legislature has officially declared to be substandard is, in the jury's opinion, not substandard at all. In other words, if any inference of negligence is to be drawn from the breach of a criminal statute, it must be a compulsory—and not merely a permissible—inference. Additional comment seems necessary on Judge Lehman's conclusion that this licensing statute was one passed for the protection of the general public as a whole against the likelihood of incompetent practitioners and was not one enacted for the protection of individual personal interests. It is difficult to understand how he reached this conclusion. One might suspect that it was reached after the appellate judges first decided that breach of this statute was not a factor to be considered in a civil action. At any rate, there is certainly a safer and more certain way of analyzing the situation than to proceed in this way on the basis of so-called "legislative intent."[20] For at this stage of the reasoning Judge Crane's remarks in his dissent seem quite as acceptable as those in the majority opinion, whereas the proper analysis furnishes a complete answer to the sentiments of the dissenting judge.

The real reason that the licensing statute in question cannot operate in any way as the basis of civil liability is that it establishes no standard of conduct—it does not stipulate that any particular human act, let

[20] As to this phrase, see Lowndes, *supra* note 5, at 362.

alone anything which the defendant happened to do in practicing on the person of the plaintiff, must be done in any prescribed fashion. Hence, in the absence of any provision in the act to the effect that its breach will give rise to a civil action for damages, there is nothing to operate as a legislatively imposed substitute for the standard of the reasonable and prudent man. Consequently, there is nothing in the situation compelling the court to treat this case any differently from any other malpractice case. That is, the legislature did not establish a prescribed method of behavior or conduct for any doctor or practitioner, licensed or unlicensed, to follow when operating on or otherwise dealing with the person of a patient. The plaintiff could point to no act of the defendant which was a departure from any set routine of conduct promulgated by the legislature. Therefore, the common-law standard of the conduct of a reasonable and prudent man (or doctor) under the circumstances, no doubt buttressed by expert testimony, must prevail as the yardstick employed to measure the actionability of the defendant's conduct.

For instance, suppose that New York had a criminal statute making it a misdemeanor for any doctor to use on the person of any patient a hypodermic needle that had not been sterilized in a certain specific way. If a doctor nevertheless violates this statute and his patient is infected as a result, then the doctor is automatically negligent. There is no occasion to consult a jury on this point or to regard the breach of statute as evidence of negligence. It *is* negligence because it is a departure from an officially established course of conduct. And no matter how good a story the doctor tells at the trial in extenuation of what he did,[21] it would be incorrect to permit the jury to conclude that the doctor had behaved reasonably under the circumstances and was not negligent. This is because the statute in question deals with specific human conduct, branding the departure from a stipulated method of procedure as substandard. Where this standard is set by the legislature, it would be folly to permit a common jury to create the competing standard, which would be implicit in its verdict, to the effect that the doctor had not been negligent in having failed to come up to the mark fixed in the statute.

Of course, the temptation is overwhelming to say that a licensing statute of the sort under discussion above is designed to keep the unskilled

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21 Of course, a good thing can be carried too far. As to the mitigating effects of extenuating circumstances, even where there is a breach of a safety statute, see Morris, *The Role of Criminal Statutes in Negligence Actions,* 49 COL. L. REV. 21 (1949); and see Notes and Comments, [1942] WIS. L. REV. 422.

and incompetent from posing and practicing as doctors. Hence, if it is obeyed, then the individual members of the public who are potential patients are, to that extent, protected from the unskillfulness and incompetence of those who could not (or at least did not) pass the examination required to secure the license. Moreover, if the particular defendant in *Brown v. Shyne* had not violated the New York statute, then the plaintiff would not have been hurt, as she was.[22] But there is still no apparent logical connection between the breach of this statute and the harm to the plaintiff! Defendant may have been ineligible to take the licensing examination because of, say, lack of citizenship or state residence requirements; yet he may still be a competent doctor and have practiced prudently in dealing with the plaintiff. As far as the statute is concerned, and on the basis of what is actually known about the way in which the defendant practiced on the plaintiff on any particular day, there is no more logical connection between the breach of statute and the plaintiff's damage than there is between the defendant's having or not having gotten out of bed on that day. Had he stayed in bed on each day he practiced on the plaintiff, instead of going to his office, he would not even have seen the plaintiff and thus could have done her no harm. In other words, he did nothing whatsoever in dealing with the plaintiff which was defined and described in the statute as the correct and standard method of procedure. To be sure, he practiced on her in violation of the statute. But that does not mean that he did so in any less skillful or competent a manner than a duly licensed doctor would have done.

To hold otherwise, and to allow breach of the licensing statute to be considered as a factor in establishing a case of malpractice against the defendant, is to add a penalty to the statute which the legislature did not see fit to include. Because the legislature set no standard of conduct in the act, with which the common-law standard would invidiously compete if it were employed by the trial court, there is no reason at all for permitting the breach of this statute to play any part in a civil action for damages—and every reason why it should not do so. Indeed, the very fact that the trial court in *Brown v. Shyne* instructed the jury that breach of the licensing statute would be some evidence of negligence only, and not negligence *per se,* is significant. For if breach of this statute were germane at all in this action, then it should properly

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22 For a spirited defense of the position adopted by Judge Crane in *Brown v. Shyne,* see Notes & Comments, 22 CORNELL L. Q. 276 (1937), noting the case of Hardy v. Dahl, 210 N. C. 530, 187 S. E. 788 (1936), in which the North Carolina court held that breach of a licensing statute by a doctor was not to be regarded as evidence of negligence.

be conclusive on the issue of negligence, establishing it as a matter beyond doubt and leaving nothing to the conjecture of the jury. It is possible that the trial judge sensed this discrepancy and tried to compromise the matter by the intermediate position which he took. But, to repeat, this was a bad thing to do because criminal statutes should play absolutely no part in civil litigation unless it is absolutely unavoidable, either because the legislature has specifically provided for civil liability or because it has promulgated a specific standard of conduct—a correct way of doing a particular thing—which the court simply cannot ignore in the case before it.

IV.

Perhaps the whole point of this discussion will appear more obvious in connection with statutes making it a criminal offense to drive a car without a license and not providing any civil responsibility therefor on the occasion of damages.[23] Let us assume two typical fact situations. Suppose defendant is driving a car and collides with the plaintiff, the facts revealing that defendant at the time did not have a license to drive in violation of a statute making such circumstance a criminal offense. Or suppose, on the other hand, that the plaintiff is the one who is unlicensed to drive at the time of the collision. In the first situation the defendant's liability to plaintiff depends on proof of his negligence; and it would seem ridiculous to permit the plaintiff to establish the defendant's negligence on the basis of his having violated the licensing statute. In the second situation (assuming that the defendant there was negligent) it would be equally absurd to deny recovery to the otherwise non-negligent plaintiff on the basis of his having violated the licensing statute. The reason for the stated conclusion in each case is that a licensing statute is not a safety statute and, therefore, is not the kind of statute the breach of which amounts to negligence *per se*. It does not specify the standard or correct way to do anything; while driving without a license does not signify in any conceivable way that at the time in question such driving did not come up to the approved standard in any respect. This is true because a licensing statute does not stipulate what standard

[23] For a number of fairly recent authorities on this matter, see 26 TEXAS L. REV. 824 (1948); 1 BAYLOR L. REV. 75 (1948); 12 So. CALIF. L. REV. 497 (1939) and 11 ORE. L. REV. 206 (1932). See also Straudt v. Cannon, 29 Cal. App. 2d 509, 85 P. 2d 160 (1939); Aycock v. Peaslee G. P. & V. Co., 60 Ga. App. 897, 5 S. E. 2d 598 (1939); Humbert v. Lowden, 323 Ill. App. 557, 56 N. E. 2d 323 (1944); Ruckman v. Cudahy Packing Co., 230 Iowa 1144, 300 N. W. 320 (1941); Davis v. Simpson, 138 Me. 137, 23 A. 2d 320 (1942); Mahowald v. Bechrich, 212 Minn. 78, 2 N. W. 2d 569 (1942); Renner v. Martin, 116 N. J. L. 240, 183 Atl. 185 (1936); and Hoke v. Atlantic Greyhound Corp., 226 N. C. 692, 40 S. E. 2d 345 (1947).

conduct on the road should be, so that breach of the licensing statute (i.e., not having a license) is tantamount to not having observed the statutory standard of conduct in driving. An unlicensed driver may be a superb driver; and whether he is or not, he may have driven with due care on the occasion in question. Certainly his not having a license at the time is hardly probative of his not having done so.

Suppose on the other hand that a motorist violates a statute requiring a full stop when entering an arterial highway from a side road; or suppose he violates a statute specifying 45 miles per hour as the maximum speed on a certain stretch of highway. No matter how skillfully he has otherwise handled his car, he has fallen short of official statutory rules of conduct and to that extent is automatically negligent. If he becomes involved in harm arising out of risks which these statutes were designed to prevent, then he is either liable or is denied recovery, whatever the case may be. The fact that his conduct might not have been regarded as negligent in the absence of these statutes is immaterial. These statutes deal with specific conduct and prescribe how it must be performed. Any deviation therefrom is substandard; and a jury must not be permitted to hold otherwise. These statutes actually deal in terms of observable human conduct and tell how it must or must not be done, whereas a licensing statute does not do this at all. Incidentally, it is apparent that the motorist in question would be held automatically negligent for the breach of these statutes whether or not he carried in his pocket a license to drive. It is equally clear that a licensed driver might as easily be guilty of ordinary negligence in the absence of statutory standards of good driving; for his having a license certainly cannot be accepted as having any probative value indicating that he was not negligent under any particular circumstances.

The New Hampshire Supreme Court has held in *Johnson v. Boston & Maine Ry.*,[24] that breach of a licensing statute is contributory negligence preventing recovery of damages by a motorist against a railroad which negligently caused him damage. The particular licensing statute did not include a provision imposing civil responsibility for its breach, either in the shape of liability for damages caused or by way of subjecting the violator to the defense of contributory negligence. In spite of the fact that such a general licensing statute does not lay down a standard of conduct which a court could not very well ignore in negligence litigation, the New Hampshire Court held that it did. Thus it said: "The legislature laid down a rule of conduct. It has not said merely that whoever drives without a license shall be punished. . . .

[24] 83 N. H. 350, 143 Atl. 516 (1928).

In addition to that provision it has enacted another, specifically forbidding the act of driving. . . . It did this to protect lawful travellers." The court then went on to observe: "The reason for this prohibition is that driving by the unfit is dangerous." After pointing out that the statute does not prohibit unlicensed driving "because the party does not have a certain paper in his pocket, or because he had not paid the state two dollars," the court remarked: "He is classed with the unfit because he has not taken the prescribed method to establish his fitness in advance." And adverting to the handling of this issue in other jurisdictions the court added: "Because an unlicensed driver was in fact competent, or might be so, it has been held that the prohibition might be disregarded, upon the ground that the violation was not causal. This amounts to substituting the judgment of the court for that of the legislature in fixing the line between legal and illegal conduct." Conceding that frequently the unlicensed driver is as fit as the licensed, the court declared that the legislature had acted to keep the unfit off the road and said: "There is no other practical way to accomplish the desired result. The fit can protect themselves by procuring a license. If they do not, they cannot complain of being classed with the unfit."

In the writer's humble opinion, the New Hampshire Court's treatment of this matter was utterly inadequate and unrealistic, betraying an almost complete ignorance of the role of criminal statutes in civil litigation. Suppose the New Hampshire legislature imposes a fine of, say, $25 for driving on its highways without a license. Then assuming that the plaintiff in the case just discussed had not actually driven negligently and that the defendant railroad was negligent, if his damages were $10,000, the plaintiff has been fined $10,000 for violating this statute and is still subject to the further fine of $25. And this, when all the evidence indicates that the plaintiff was driving carefully and was violating no "rule of conduct" in the nature of a "standard of care" set down by the legislature! If a statute had made it a misdemeanor for a motorist not to stop, look and listen at a railroad crossing and the plaintiff had violated *that* statute when he was hurt, then it would be correct to deny him recovery, regardless of the railroad's negligence, if the evidence indicated a causal relationship between nonobservance of the statute and the plaintiff's harm.[25] Otherwise we would

[25] I assume, of course, that there always has to be some *real* causal relationship between the breach of a safety statute and the harm—just as there must be such a relationship between ordinary negligence and the harm complained of—in order for the violator of the statute to be civilly responsible as negligent *per se*, either for damages as a defendant or defensively, as a plaintiff. But I might add that I think any talk of causal connection or its absence between breach of a licensing statute and the damage in suit seems ex-

get involved in pitting the plaintiff's and the jury's judgment of what would be prudent conduct under the circumstances against that of the legislature's; and the inference that the standard of prudent conduct established by the legislature must prevail in the civil litigation ensuing breach of the statute is overwhelming. Moreover, to proceed in this fashion on the basis of breach of a licensing statute, which does *not* establish any rule of conduct in the nature of a standard of care (in the sense that it stipulates how certain aspects of the act of driving a car should or should not be done), seems absurd and illogical on the basis of any understandable premises. The New Hampshire court's declaration that "There is no other practical way to accomplish the desired result" is an utter *non sequitur*; for the legislature could increase the size of the fine for breach of the licensing statute and, if it saw fit, could even expressly impose civil responsibility for its breach! But until it goes that far, no court should anticipate that result on the basis of breach of a licensing statute.

While it is not altogether clear, the New Hampshire legislature in 1937 apparently took this same point of view, adding to the statute in question the following clause: "and if any person shall operate a motor vehicle in violation of this section such violation in any civil action shall be prima facie evidence of his unfitness to operate a motor vehicle."[26] Anyway, the Supreme Court of New Hampshire interpreted this new language to mean that the lack of an operator's license was no longer "causal in the strictest sense" of any accident in which the unlicensed driver was involved, regarding it rather as a mandate to inquire into the driver's actual fitness to drive.[27] Under this new view, lack of a license would merely operate as a presumption of unfitness, rebuttable by evidence to the contrary. Of course, this in effect makes absence of a license probative to some extent of the driver's unfitness, which in turn might also affect the chances of an unlicensed driver's attempt to convince a jury that he was free from negligence. While this result, even as indirect as it is, runs counter to the conviction that breach of a licensing statute should play no part at all in civil litigation because it sets no standard of care governing particular human conduct, still it

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tremely out of place and utterly inappropriate. See Peabody v. Campbell, 286 Mass. 295, 190 N. E. 521 (1934), with which compare the "causation" analysis in Falk v. Finkelman, 268 Mass. 524, 168 N. E. 89 (1929), to indicate what I mean. The correct analysis of such cases obviates any need for the mention of causation at all.

[26] N. H. Rev. Laws c. 117, § 9 (1942).

[27] Mandell v. Dodge-Friedman Poultry Co., 94 N. H. 1, 45 A. 2d 577 (1946). For a fairly complete account of the New Hampshire development, see 163 A. L. R. 1370, at 1384-6 and 1391-2.

must be conceded that such result is due to an express legislative provision inserted in the criminal statute and is not due to a purely judicial interpolation.

V.

In Massachusetts it has long been the law that drivers of unregistered automobiles are, without more, liable for harm they cause and are unable to recover for harm they sustain. This result was not due to any express language in the statute requiring cars to be registered but was a matter entirely of judicial interpolation. The theory underlying this view was that a person driving an unregistered car is a trespasser on the highway; and his liability for damages or inability to recover was originally governed by analogy to the plight of one who violated the Lord's Day Act of that state.[28] Back in 1909, when this notion was first perpetrated in *Dudley v. Northampton Street Ry. Co.*,[29] it was certainly indefensible under prevailing views, since the principles governing the proper role of violations of criminal statutes in civil litigation had long been established. Nevertheless, a Connecticut motorist, driving a car registered in that state, was denied recovery for damages sustained when his automobile was struck by a trolley-car in Massachusetts, because at the time of the collision he had overstayed by two days the fifteen-day visitor's privilege accorded to out-of-state vehicle owners. It is true that the plaintiff in that case had violated the criminal law of Massachusetts when he remained there after fifteen days, without having registered his car in that state. But it is equally true that had he begun his vacation a couple of days later, he would not have been held guilty of contributory fault barring his recovery of damages.

It is hard to perceive how breach of this criminal statute could have anything to do with civil liability or contributory fault barring recovery. Apparently the Massachusetts court took the position that if the registration statute was observed, then those who were improperly registered would not be on the highways, and to that extent the roads would be freer of obstructions. In short, had the plaintiff in the above case gone back to Connecticut when his fifteen days ran out, he would not have been in Northampton to be struck by the defendant's trolley-car. There is, of course, a certain amount of crude reason in this observation, just as there is in the view that one who travels on Sunday, in violation of a Lord's Day statute, would not have been hurt if he had been in church at the time or had not left his house at all. But some state

28 See MASS. ANN. LAWS c. 136 (1949) and the various older statutes referred to following some of the sections thereof, going back to as early as 1692.

29 202 Mass. 443, 89 N. E. 25 (1909).

courts have taken what is generally regarded as the more rational view that respect for the Lord, if it has to be imposed by law at all, is adequately taken care of by fines or other punishments.[30] Apparently the Massachusetts court's view of retribution for such offenders was that it served them right if they got hurt while travelling on Sunday—an attitude which seems most un-Christian and which betrays a lack of faith in the legislature's sanctions prescribed in the statute.

Actually, where Sunday laws prevailed, it might seriously be maintained that the presence of offenders on the streets would not be contemplated at all on that day. But the registration laws could not possibly be so construed, for all cars are welcomed on the highways of Massachusetts if they are properly registered. Under the statute involved in the *Dudley v. Northampton Street Ry. Co.* case, *supra,* the visitor from Connecticut was welcome and expected at any time—for fifteen days without, and any length of time with, local registration. Had he come two days later or had he registered his car locally, his place on the streets of Northampton would have been secured and respected. As it was, he incurred a fine by being there on the day in question. But if the legislature had seen fit to impose only a fine for the visitor's unprivileged use of the state's highways, it is hard to appreciate the occasion for the deprivation by the court of his civil rights as well or for increasing his fine a hundred fold or more in the teeth of express legislation.

By now, of course, this original aberration has become so enmeshed with statutory developments in Massachusetts, having to do with compulsory liability insurance and submission by outsiders to the jurisdiction of Massachusetts courts, that it has virtually acquired the express sanction of its legislature.[31] At the same time the Massachusetts court has pursued the idea that breach of the statute requiring operators of cars to have currently valid driving licenses is evidence of negligence, and then only when it is shown to have been a causative factor in contributing to the harm in suit, whatever that qualification means. Thus, in effect, violation of the Massachusetts registration act amounts to negligence *per se,* while violation of the statute requiring an operator's license is only evidence of negligence.[32] Actually, the Massachusetts cases involving breaches of the registration acts do not seem like negligence cases at all. For the imposition of liability on defendants, and

30 See PROSSER, TORTS 266 (1941).

31 See annotation in 163 A. L. R. 1370, at 1375 *et seq.*

32 Kenyon v. Hathaway, 274 Mass. 47, 174 N. E. 463 (1931); Peabody v. Campbell, 286 Mass. 295, 190 N. E. 521 (1934); Keeler v. Godfrey, 308 Mass. 573, 33 N. E. 2d 265 (1941).

the denial of recovery by plaintiffs, who were in violation of the registration law, are not purported by the Massachusetts court to have any rational connection with the law governing the administration of losses caused inadvertently by motorists. It is, rather, as if a defendant were required to pay a stiff judgment because, when he was interviewed at the time of the accident, he was discovered to have been in default of payment of his real property taxes; or as if a plaintiff under similar circumstances were denied recovery because it transpired that he was an alien illegally overstaying his leave on a student visa from England or that he had played bridge for money the previous Saturday night. While the Massachusetts court also seems clearly wrong in regarding breach of the statute requiring a valid operator's license as evidence of negligence, at least one can perceive a crude method in its error and understand what it is groping for, somewhat as an intuitive parent can divine the inarticulate grunts of an infant.

It has always seemed odd that Thayer, in his classic essay,[33] did not take the Massachusetts court to task for having embarked on this twofold heresy. He wrote this essay shortly after the court had taken the first steps in that direction. While he was certainly aware of this development and vaguely cast aspersions on it, he completely neglected to attack it in its most vulnerable spot. That is, since the registration and licensing statutes were not safety laws, and did not prescribe standards of human conduct involved in the actual driving of cars, then (unless the legislature had expressly provided otherwise) the violation of these criminal statutes could play no rational part in administering the law governing compensation for inadvertently caused harm—the law of negligence. For the only rational part such violation could play would be to indicate departure from the officially approved standard of care up to which the parties litigant were supposed to come. If the statutes do not set such standards at all and do not even purport to govern the immediate act of driving a car or to set rules for an automobile's progress on the roads, then their breach has no part whatsoever in civil litigation. It is difficult to tell whether Thayer ever pushed his thesis to this point. He certainly did not do so in his leading essay in the general field. And while a good deal of the criticism made by Professor Lowndes of Thayer's essay[34] is valid, I strongly dissent from most of what he himself has to say on this subject.

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[33] Thayer, *supra* note 5.

[34] Lowndes, *supra* note 5.

VI.

Every year a substantial number of torts students seem to believe that breach of a licensing statute should be regarded as tantamount to liability—negligence *per se*, if you will—although many of them would settle for its being simply evidence of negligence. They seem to see some necessary and logical connection between not having a license, which is granted only on the basis of certain examinations, and inability to engage competently in the field of activity which can lawfully be pursued only by duly licensed people. But only in one respect do these students seem to have a valid argument—and even that is refutable. Suppose, they say, that it is impossible to secure a driving license without taking certain tests, one of which is an eye test. If the applicant fails to come up to a certain standard of vision without glasses, he is required to get glasses and to wear them at all times he is driving the car. Now, suppose X drives without a license and, in connection with civil litigation, it transpires that X's vision is substandard according to the test prescribed in securing a license. Also assume that the factor of vision was one of the pertinent elements involved in the litigation. Here, it is said, is a licensing statute that actually sets a standard of care; and if it appears that X had ignored this standard of care by violating the statute, then that is negligence on X's part. However, this conclusion follows only if it also appears that X's vision was faulty *and* that he was not wearing glasses at the time of the accident. For if X's vision without glasses was up to the standard set by the legislature, then breach of the statute is irrelevant. The same would be true of the unlicensed driver even if his vision were substandard, if at the same time it appeared that he was wearing glasses when the accident occurred.

In other words, it is conceded that a licensing statute can include a provision which, to a limited extent, also makes it in part a safety statute. But, to the extent that it *is* a safety statute, setting a standard of conduct, a failure to have a license as required by law is not, in itself, proof that the stipulated standard of conduct was not observed. That can be shown in this particular case only if X's vision were actually substandard *and*, at the same time, he was not wearing corrective glasses when the accident occurred. Hence this illustration does not seriously affect the main thesis in this essay. On the other hand, if the legislature made it a criminal offense to drive into the sun without wearing smoked or tinted glasses, then it would seem that non-observance of that law should be treated as negligence in itself in civil litigation.

The fact remains that licensing and registration acts do not set standards of care. Hence, their breach should not play any part what-

soever in civil litigation, unless the legislature expressly provides otherwise. For nobody can adequately support the proposition that unlicensed operators and doctors are automatically unfit because they are unlicensed or that they operated negligently or unskillfully at any particular time for that reason. Nor can there be shown any logical and compelling argument to the effect that such a breach of a licensing statute under such circumstances is even evidence of negligent operation at any particular time. Too many of us know as a practical matter that there is no compelling logical connection.

State legislatures are always free to impose civil responsibility for breach of criminal statutes when, as and if they wish to do so, as long as they remain within the vague boundaries of our state and federal constitutions. If there are any doubts in this general field—doubts which this article has shown do exist—a sound rule of thumb for our courts to follow is to avoid placing any importance whatsoever on breaches of criminal statutes in civil litigation. They should do so, as pointed out above, only when the legislature has expressly said they must or when they cannot avoid doing so, without compromising the settled principles of the common law of negligence by letting a jury compete with the legislature's evaluation and official standard governing specific human conduct.