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TORT LIABILITY FOR CRIMINAL NONFEASANCE*

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I. Introduction.

The common law has treated the Good Samaritan with uncommon harshness over the years, while the priest and the Levite have been treated with uncommon generosity.¹ One who attempts in good faith to assist someone in peril exposes himself to potential civil liability in the event of his negligence, but one who stands idly by without lifting a finger incurs no liability, although the latter conduct is probably more reprehensible and more deserving of a civil sanction.² First year law students are normally horrified to learn that the common law does not require one to rescue a drowning man,³ that one need not warn a blind man who is stepping in front of a moving automobile,⁴ and that there is no duty to prevent someone from walking into the mouth of a dangerous machine.⁵ They are no less shocked when they discover that doctors, who faithfully subscribe to the glorious Hippocratic Oath, are not subjected to civil liability if they hypocritically refuse to attend on a dying patient.⁶ Nor does the common law require one to feed the starving, to bind up the wounds of those who are bleed-

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¹See generally, Prosser, *The Law of Torts*, (3rd ed., 1964), p. 334; Fleming, *The Law of Torts* (3rd ed., 1965), p. 145; 2 Harper and James, *The Law of Torts* (1956), p. 1044.

²Prosser, *op. cit.*, *ibid.*, p. 339; Ames, *Law and Morals* (1908), 22 Harv. L. Rev. 97, 112, Reprinted in *Selected Essays on The Law of Torts* (1924), p. 13; Bohlen, *The Moral Duty to Aid Others As A Basis of Tort Liability* (1908), 56 U. Pa. L. Rev. 217, 316.

³*Osterlind v. Hill* (1928), 263 Mass. 73, 160 N.E. 301.

⁴The Restatement of the Law of Torts (1934), §314, Illustration 1.

⁵*Buch v. Amory Manufacturing Co.* (1897), 69 N.H. 257, 44 Atl. 809; *Gautret v. Egerton* (1867), L.R. 2 C.P. 371.

⁶*Hurley v. Edingsfield* (1901), 156 Ind. 416, 59 N.E. 1058.

ing to death,⁷ nor to prevent a child from engaging in dangerous conduct.⁸

The common law has acknowledged on occasion that "the impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity"⁹ and that "to protect those who are not able to protect themselves is a duty which everyone owes to society",¹⁰ but on the question of civil liability it has adopted a hands-off policy. The regulation of this type of conduct has been assigned to the "higher law" and to the "voice of conscience" both of which would appear singularly ineffective either to prevent the harm or to compensate the victim.¹¹ The common law courts have resisted the creation of a general civil obligation to render assistance to individuals in danger, although in several European countries such a duty has been imposed.¹²

The ethical and religious precepts of Western civilization have had more influence upon legislatures which have enacted various types of criminal or quasi-criminal legislation requiring certain affirmative conduct.¹³ The legislative commandments may be decreed by statute, regulation or order in council, or municipal ordinance and their breach is normally punishable by fine, imprisonment or other sanctions.¹⁴ One of the most prevalent pieces of this type of legislation is the "hit and run statute". Where the driver of a motor vehicle is involved in a collision, he is required to stop, to give his name and address and "to render all possible assistance" whether he was at fault for the accident or not.¹⁵ Failure to comply is punishable by fine, imprisonment and other sanctions. Legislation which penalizes the owner of a motor vehicle who fails to insure against public liability is becoming increasingly common.¹⁶ The purpose of this legislation is to ensure that sufficient funds will be available to satisfy any tort judgment secured by a third person against the owner of a motor vehicle that is involved in an accident.

⁷ *Allen v. Hixson* (1900), 111 Ga. 460, 36 S.E. 810.

⁸ *Sidwell v. McVay* (1955), 282 P. 2d 756 (Okla.).

⁹ *Scaramanga v. Stamp* (1880), 5 C.P.D. 295, at p. 304 (Cockburn C.J.), cited in *Love v. New Fairview* (1904), 10 B.C.R. 330 (C.A.).

¹⁰ *Jenoure v. Demege*, [1891] A.C. 73, at p. 77.

¹¹ Prosser, *op. cit.*, footnote 1, p. 336.

¹² Dawson, *Negotiorum Gestio: The Altruistic Intermeddler* (1961), 74 Harv. L. Rev. 1073, at p. 1105; *Failure to Rescue: A Comparative Study* (1952), 52 Col. L. Rev. 631.

¹³ See *infra*.

¹⁴ See *infra*.

¹⁵ See, for example, Ontario Highway Traffic Act, R.S.O., 1960, c. 172, s. 143a and California Vehicle Code (1959), §20001, 20003, 20004.

¹⁶ In the United Kingdom, Road Traffic Act (1930), 20 & 21 Geo. 5, c. 43, s. 35(1); In Massachusetts, Mass. Ann. Laws, c. 90; In New York, N.Y. Vehicle and Traffic Law, §310; In North Carolina, N. C. Sess. Laws of 1957, c. 1393.

Municipal ordinances frequently require abutting owners to keep the public sidewalk bordering their property free and clear of ice and snow under threat of criminal prosecution.¹⁷ Nor is it uncommon to find statutes that require individuals to assist a police officer in the apprehension of a criminal if so required¹⁸ and to supply food, clothing and medical assistance to near relatives,¹⁹ and other such legislation.²⁰ Thus, nonfeasance may amount to a crime.

The purpose of this article is to examine the impact of this criminal legislation on the common law of tort in order to discover whether tort law has followed the criminal law, as in days gone by equity followed the common law, or whether tort law has remained aloof from pollution by these criminal laws. This article will try to bring into focus the influence of criminal legislation in the creation of new tort duties where at common law no duty existed. No attempt will be made to analyze the influence of criminal legislation on tort liability where there is already a common law duty in existence. Discussions of the doctrines of negligence *per se*, *prima facie* negligence and the evidence of negligence rules will be left to others,²¹ although any discussion of tort liability for criminal nonfeasance cannot avoid them completely.

Some writers have denounced as "notorious"²² and "improper"²³ any judicial use of criminal legislation to create new tort duties,²⁴ others have defended such action,²⁵ and a good number of writers and courts generally have not distinguished between the use of criminal legislation where a common law duty is already

¹⁷ For example, see Halifax by-law in *Commerford v. Board of School Commissioners*, [1950] 2 D.L.R. 207 (N.S.S.C.).

¹⁸ See Criminal Code of Canada, S. C., 1953-54, c. 57 as am., s. 110(b).

¹⁹ *Ibid.*, s. 186(1), (2); Children's Maintenance Act, R.S.O., 1960, c. 55, s. 1.; California Penal Code, § 270.

²⁰ See *infra*.

²¹ Alexander, *Legislation and The Standard of Care in Negligence* (1964), 42 Can. Bar Rev. 243; Thayer, *Public Wrong and Private Action* (1914), 27 Harv. L. Rev. 317; Morris, *The Role of Criminal Statutes in Negligence Actions* (1949), 49 Col. L. Rev. 21; Lowndes, *Civil Liability Created by Criminal Legislation* (1932), 16 Minn. L. Rev. 361; Gregory, *Breach of Criminal Licensing Statutes in Civil Litigation* (1951), 36 Cornell L. Q. 622; Williams, *The Effect of Penal Legislation in The Law of Tort* (1960), 23 Mod. L. Rev. 233; Fricke, *The Juridical Nature of The Action Upon The Statute* (1960), 76 L. Q. Rev. 240.

²² Fleming, *op. cit.*, footnote 1, p. 130, footnote 23.

²³ Williams, *loc. cit.*, footnote 21, at p. 259.

²⁴ Gregory, *loc. cit.*, *ibid.*, and Thayer, *loc. cit.*, *ibid.*, strongly opposed this type of judicial use of legislation.

²⁵ Morris, *loc. cit.*, *ibid.*; See also Morris, *Studies in The Law of Torts* (1952), p. 141.

in existence and where no common law duty has been recognized.²⁶ In their treatment of this problem, the common law courts have been forced to grapple with the ancient dichotomy of misfeasance and nonfeasance; they have insisted upon a quest for a non-existent legislative intention that has hampered the articulation of rational guidelines; they have been drawn into a discussion of causation, proximate cause, the scope of the risk and many of the other problems that have plagued the courts in their treatment of legislation. The courts have perpetuated unnecessarily the confusion which surrounds this area by their refusal to discuss candidly the conflicting policies to be resolved. This article will attempt to demonstrate that the courts have on some occasions created new civil duties of care by analogy to the criminal legislation where they were sympathetic to the legislative objects. On other occasions, where they were apathetic to the legislative policy, they have refused to impose civil liability for criminal nonfeasance.

II. *Nonfeasance and Misfeasance: History and Policy.*

The great Bohlen has written²⁷ that "there is no distinction more deeply rooted in the common law than that between misfeasance and nonfeasance, between active misconduct working positive injury to others and passive inaction. . .". He contended that requirements of positive action are "exceptional" and "abnormal".²⁸ This distinction, although admitted to be a difficult one to draw in practice²⁹ is defended by some writers³⁰ and judges³¹ and is attacked by others.³² Nevertheless, one large fact remains: courts do apply different standards to cases of inaction than they do to cases of positive action.

Historically, it is contended that the King's courts did not wish to concern themselves with the supervision of acts of omission since they encountered sufficient difficulties in their regulation of the

²⁶ For example, Fricke, *op. cit.*, *ibid.*; Salmond, *Torts* (12th ed., 1957), p. 467; Charlesworth, *Negligence* (4th ed., 1962), p. 951.

²⁷ Bohlen, *loc. cit.*, footnote 2, at p. 219.

²⁸ *Ibid.*, at p. 221.

²⁹ *Ibid.*; see also, Prosser, *op. cit.*, footnote 1, p. 335; Fleming, *op. cit.*, footnote 1, p. 146.

³⁰ Wright, *Negligent "Acts or Omissions"* (1941), 19 *Can. Bar Rev.* 465, at p. 473; Thayer, *loc. cit.*, footnote 21; See also, *Wasney v. Jurazsky* (1933), 41 *Man. R.* 46, [1933] 1 *W.W.R.* 155 (C.A.) relying on Thayer.

³¹ See *East Suffolk Catchment Board v. Kent*, [1941] *A.C.* 74.

³² Morris, *loc. cit.*, footnote 21; Wright, *loc. cit.*, footnote 30; See, *Vancouver v. McPhalen* (1911), 45 *S.C.R.* 194, where Justice Idington said: ". . . the sooner the distinction between non-feasance and misfeasance . . . is discarded, the better."

more flagrant positive aggressions.³³ Only when someone voluntarily undertook an obligation by entering into some relationship with another, did the courts require the individual to take care. Thus, in cases of gratuitous bailment, for example, the courts created a positive duty of care toward the bailor.³⁴

No legal doctrine can long survive because of historical reasons alone in the absence of a current policy base. Several policy reasons are advanced in support of the nonfeasance principles. The common law is said to promote rugged individualism and the independence of mankind.³⁵ People who live in common law countries should be self-sufficient and shun dependency on others. However, to call for help in time of distress is the natural reaction of even the most independent of men, and such conduct is not criticized, although it might be if there were no distress. It is suggested that independence in time of danger is not necessarily a virtue and that by insisting upon this the common law seeks to do too much in the way of the enforcement of individualism.³⁶

Although we have seen the gradual eclipse in large measure of the rugged individualism of an earlier era by legislative enactment requiring positive conduct, the common law courts have clung steadfastly to the ancient distinction between misfeasance and nonfeasance. Statutes have been passed which require individuals under threat of criminal prosecution to serve their country in time of war and peace, to pay income taxes and to file tax returns, to disclose certain political affiliations and certain financial dealings, to insure themselves against penury and disability in old age and against the inability to pay for medical services.³⁷ But the common law courts continue to declare that there is no civil liability for simple nonfeasance.

It has been said that the common law should not enforce unselfishness by making one man serve his fellows³⁸ since this is too great an infringement of personal liberty which smacks of slavery or socialism.³⁹ Similarly it is contended that the courts should

³³ Prosser, *op. cit.*, footnote 1, p. 334; Fleming, *op. cit.*, footnote 1, p. 145.

³⁴ Bohlen, *loc. cit.*, footnote 2, at p. 316.

³⁵ Harper and James, *op. cit.*, footnote 1, p. 1046; Prosser, *op. cit.*, footnote 1, p. 334; McNiece and Thornton, Affirmative Duties in Tort (1949), 58 Yale L. J. 1272, at p. 1288; Hale, *Prima Facie Torts, Combination and Nonfeasance* (1946), 46 Col. L. Rev. 198, at p. 213.

³⁶ Hale, *loc. cit.*, *ibid.*, at p. 213.

³⁷ Snyder, Liability for Negative Conduct (1949), 35 Va. L. Rev. 446.

³⁸ Harper and James, *op. cit.*, footnote 1, p. 1049.

³⁹ See, Minor, Moral Obligation as A Basis of Liability (1923), 9 Va. L. Rev. 421, at p. 422.

not enforce morality, but that this task should be left to one's own conscience.⁴⁰ Let a man be branded as a "moral monster"⁴¹ by his fellow men or by his church, but the common law will not be made into "an instrument to enforce general unselfishness".⁴² Whereas the court will not hesitate to regulate positive conduct that injures others, it is averse to require positive action from one who merely refrains from assisting another.⁴³ Underlying all of this is the notion that the proper function of the common law is to prevent men from harming one another rather than to require men to confer benefits upon one another merely because they are both human beings.⁴⁴

The common law has hesitated to require one to expose himself to danger in order to assist someone else.⁴⁵ There is a tendency to sympathize with the individual who, for fear of his own safety, fails to leap upon the armed attacker of a complete stranger. Most people are not made that way and the common law wisely recognizes this fact. Part of the explanation for this judicial reticence may be attributable to the unavailability in the past of compensation for the heroic rescuer. Until recently, one who was injured in the course of a rescue operation was deprived of compensation because he was said to have voluntarily assumed the risk of his injury or because he was said to be the cause of his own misfortune.⁴⁶ This impediment has now been removed; rescuers are able to recover from anyone who negligently places another in a position of danger which invites rescue,⁴⁷ and from an individual who places himself in a position of danger.⁴⁸ This is also the case where the rescuer is injured by the supervening negligence of a

⁴⁰ Ames, *loc. cit.*, footnote 2.

⁴¹ See, *Buch v. Amory, supra*, footnote 5.

⁴² Hale, *loc. cit.*, footnote 35, at p. 215.

⁴³ Prosser, *op. cit.*, footnote 1, p. 334. This attitude is consistent with judicial reluctance to award specific enforcement, for example.

⁴⁴ Ames, *loc. cit.*, footnote 2, at p. 16 (in Selected Essays).

⁴⁵ McNiece and Thornton, *loc. cit.*, footnote 35, at p. 128; Hale, *loc. cit.*, footnote 35, at p. 215.

⁴⁶ See, for example, *Kimball v. Butler Bros.* (1910), 15 O.W.R. 221; *Anderson v. Northern Ry Co.* (1875), 25 U.C.C.P. 301; See, Fleming, *op. cit.*, footnote 1, p. 164.

⁴⁷ *Wagner v. International Railway* (1921), 232 N.Y. 176, 133 N.E. 437; *Haynes v. Harwood*, [1935] 1 K.B. 146; *Morgan v. Ayles*, [1942] 1 All E.R. 489; *Seymour v. Winnipeg Electric Ry.* (1910), 13 W.L.R. 566, 19 Man. R. 412. If conduct is rash, no recovery is possible: *McDonald v. Burr.* [1919] 3 W.W.R. 825, 49 D.L.R. 396 (Sask. C.A.).

⁴⁸ *Baker v. Hopkins*, [1959] 1 W.L.R. 966; *Carney v. Buyea* (1946), 271 App. Div. 338, 65 N.Y.S. 2d 902, appeal den. (1947), 271 App. Div. 949, 68 N.Y.S. 2d. 446 and, see, Prosser, *op. cit.*, footnote 1, pp. 316-317; But cf. *Dupuis v. New Regina Trading Co.*, [1943] 2 W.W.R. 593, 4 D.L.R. 275; Wright, Note (1943), 21 Can. Bar Rev. 758.

third party.⁴⁹ It should be added that, to fulfill a requirement of rendering aid to someone who is being attacked, the rescuer need not hurl himself upon the attacker and engage in mortal combat. It may suffice merely to shout, to call the police or to seek help from others.

Some of the arguments against the creation of a positive duty to render assistance to one in danger are administrative in nature.⁵⁰ First, there is the problem of selection of the individual on the crowded beach who is to bear the responsibility for the failure to rescue the drowning man. Admittedly, this is a difficult, if not an insurmountable obstacle, since all of the individuals who were aware of the situation and who were capable of assisting could be held responsible. It has been suggested that, if one is made to assist another in danger, hordes of rescuers may impede one another in the rush to comply with the law.⁵¹ It has been amply demonstrated that this fear is completely unfounded and that several people can better effectuate a rescue than one person alone.⁵² Second, the degree of danger to which one should be required to expose himself for the benefit of another is difficult to define. The test propounded by Prosser,⁵³ however, comes as close to a workable guideline as common lawyers are accustomed to: "Knowledge of serious peril, threatening death or great bodily harm to another, which an identified defendant *might avoid with little inconvenience*, creates a sufficient relation, recognized by every moral and social standard, to impose a duty of action." Third, the length of time and the extent to which the obligation will extend poses problems. If one binds up the wounds of a bleeding stranger, how long must he continue to look after him and if one feeds a starving man must he feed him forever? These imaginary problems can be easily solved by requiring reasonable steps to be taken by all rescuers after their initial intervention. The common law has long been accustomed to drawing lines and making distinctions. There is no reason why workable rules cannot be fashioned in order to make administration feasible.

In conclusion, the common law has refused to impose a general obligation to render aid to someone in danger for historical reasons, in order to promote individualism, because it refuses to enforce unselfishness since it is a form of slavery, because of a refusal

⁴⁹ *Chapman v. Hearse* 1961 S.A.S.R. 51, aff'd 106 C.L.R. 112.

⁵⁰ See, McNiece and Thornton, *loc. cit.*, footnote 35, at p. 128; Hale, *loc. cit.*, footnote 35, p. 215.

⁵¹ Hale, *loc. cit.*, footnote 35, at p. 215.

⁵² *Ibid.*

⁵³ Prosser, *op. cit.*, footnote 1, pp. 338-339.

to require an individual to expose himself to danger for the benefit of another and because of various real or imaginary administrative problems. Despite all of these policy reasons militating against the enforcement of Good Samaritanism, a duty of positive action has been developed without the intervention of legislation in several limited situations.

III. *Developments in the Common Law.*

The dictates of humanitarianism and the criticism of the authors have had some effect in overcoming judicial dubitancy, and courts have created a duty to come to the assistance of another in a few instances—even in the absence of legislation. It has long been held that where one *negligently* places another in a position of danger, he is under an obligation to render assistance.⁵⁴ Thus, if someone negligently injures a pedestrian with his motor vehicle, for example, he must see that medical assistance is secured in order to minimize the injury. Where someone who is under no obligation to render aid does purport to assist someone in peril, he is said to have assumed upon himself the obligation to use reasonable care and if he is negligent during the course of rescue, he can be held civilly responsible.⁵⁵ The theory advanced in support of this view is that this is not a mere failure to confer a benefit, but it amounts to an aggravation of the plight of another.⁵⁶ In other words, this is misfeasance rather than nonfeasance. It is this principle, which acts as a disincentive to potential rescuers, that has led thirty-three legislatures in the United States to relieve doctors from liability in these circumstances,⁵⁷ because it was felt that some doctors were refusing to stop at the scene of highway accidents because they feared that they might be subjected to malpractice suits, although few cases to this effect are discoverable.⁵⁸

Courts have indicated a willingness to categorize as misfeasance certain conduct which superficially resembles nonfeasance in order

⁵⁴ *Northern Central Ry Co. v. State* (1868), 29 Md. 420; This may also be true where the actor is guilty of no negligence in the creation of the risk. See, Fleming, *op. cit.*, footnote 1, p. 146; Prosser, *op. cit.*, footnote 1, p. 338; See *Oke v. Carra* (1963), 38 D.L.R. (2d) 188, 41 D.L.R. (2d) 53; *Simonsen v. Thorin* (1931), 120 Neb. 684, 234 N.W. 628.

⁵⁵ *Braun v. Riel* (1931), 40 S.W. 2d 621 (Mo.); *Slater v. Illinois Central R. Co.* (1911), 209 F. 480.

⁵⁶ Prosser, *op. cit.*, footnote 1, at p. 336.

⁵⁷ Louisell and Williams, *The Trial of Medical Malpractice Cases* (1960), s. 594.2.

⁵⁸ Note, *California Good Samaritan Legislation* (1963), 51 Calif. L. Rev. 816; Note, (1962), 75 Harv. L. Rev. 641.

to impose civil liability.⁵⁹ Thus, the failure of a driver to apply the brakes of a speeding automobile, the omission of a proper signal for a proposed left turn, and the neglect to shut off the steam of a train in order to avoid an accident⁶⁰ will be properly held to be misfeasance rather than nonfeasance. The court would describe the conduct as negligently engaging in the positive act of driving rather than a mere failure to act.

There is an increasing group of special relations which import an obligation to engage in positive conduct for the benefit of another. Normally, there is some benefit enuring to the person placed under the duty, as a result of the relation which justifies the creation of the duty.⁶¹ Carriers, innkeepers, warehousemen and public utilities, who hold themselves out to the public as being prepared to give service, are subjected to this responsibility.⁶² So too, a master may be obliged to provide aid to one of his servants in peril,⁶³ a shopkeeper to his invitee,⁶⁴ and a school to a pupil.⁶⁵ Other obligations of positive action are imposed upon occupiers of premises to make their premises safe for the reception of certain entrants and for passersby on the highway.⁶⁶ The mere undertaking or promise to render aid is seldom held to create a duty in the absence of consideration.⁶⁷ But there is an inclination to hold that the promised performance was commenced and was negligently performed. This is again liability for misfeasance rather than for nonfeasance.⁶⁸

Without the assistance of any legislation requiring positive

⁵⁹ Prosser, *op. cit.*, footnote 1, p. 339.

⁶⁰ *Southern R. Co. v. Grizzle* (1906), 124 Ga. 735, 53 S.E. 244; *cf. Kelly v. Metropolitan R. Co.*, [1895] 1 Q.B. 944.

⁶¹ Bohlen, *loc. cit.*, footnote 2; McNiece and Thornton, *loc. cit.*, footnote 35.

⁶² Arturburn, *The Origin and First Test of Public Callings* (1927), 75 U. Pa. L. Rev. 217; Prosser, *op. cit.*, footnote 1, p. 334.

⁶³ *Harris v. Pennsylvania R. Co.* (1931), 50 F. 2d 866; *Szabo v. Pennsylvania R. Co.* (1945), 132 N.J.L. 331, 40 A. 2d 562; *But cf. Van Valkenburg v. Northern Navigation Co.* (1913), 30 O.L.R. 142, 19 D.L.R. 649 which may be limited to the situation where the employee was injured while he was off-duty and as a result of his own fault. Fleming suggests that this latter case "provides scant guidance for to-day", *op. cit.*, footnote 1, p. 148, note 2.

⁶⁴ *Ayres and Co. v. Hicks* (1942), 220 Ind. 86, 40 N.E. 2d 334.

⁶⁵ *Pirkle v. Oakdale Union Grammar School* (1953), 40 Cal. 2d 207, 253 P.2d 1. For other relations importing liability, see Prosser, *op. cit.*, footnote 1, pp. 337-338; McNiece and Thornton, *loc. cit.*, footnote 35.

⁶⁶ See Fleming, *op. cit.*, footnote 1, chapter 19; Prosser, *op. cit.*, *ibid*, chapter 11.

⁶⁷ *Thorne v. Deas* (1809), 4 Johns, N.Y. 84.

⁶⁸ See, for example, *Baxter v. Jones* (1903), 6 O.L.R. 360, 20 W.R. 573; See, also, Prosser, *op. cit.*, footnote 1, p. 340; Fleming, *op. cit.*, footnote 1, p. 149.

action, therefore, the courts have moved in the direction of the promotion of Good Samaritanism in a number of situations. Where some benefit is said to enure to the defendant, where some voluntary relationship has been entered into, or where the conduct can be termed misfeasance rather than nonfeasance, liability has been imposed. It is safe to predict that these instances will expand in the years to come in response to the changing attitudes of an increasingly collectivist society. We shall now turn to an examination of the role of legislation in the creation of new tort duties.

IV. *The Role of Legislation Generally.*

In order to demonstrate the strength of the common law one does not point to the way in which it has treated legislation over the years.⁶⁹ Judges argued until the early seventeenth century that they could declare invalid any legislation which offended against reason and at one time they even doubted whether the common law was capable of amendment by statute.⁷⁰ Blackstone lamented that the "majestic simplicity" of the common law was being destroyed by the "innovations" made by the "rash and inexperienced workmen" of Parliament.⁷¹ The common law courts saw themselves as the protectors of the people against oppression by the King or his Parliament.⁷² It is not surprising to learn that judicial hostility toward legislation led to many instances of strict and narrow construction which sometimes emasculated the policy of the statute.⁷³ The courts have done this normally by the utilization of various canons of construction and several presumptions which they have invented to effectuate this purpose.⁷⁴ An array of weapons is available whereby a court may undermine almost any statute which it desires to undermine.⁷⁵ The refusal of the English courts right up to the present day to examine legislative history, debates and the notes of draftsmen bears witness in part to this ancient

⁶⁹ Pound, *Common Law and Legislation* (1908), 21 *Harv. L. Rev.* 383; Landis, *Statutes and The Sources of Law*, in *Harvard Legal Essays* (1934).

⁷⁰ Maitland, *History of English Law* (1902), Reprinted in *Selected Historical Essays of F. W. Maitland* (1957), p. 114.

⁷¹ See Blackstone, *Commentaries on The Laws of England* (1765); See also, *Dr. Bonham's case* (1610), 8 *Co. Rep.* 118.

⁷² Pound, *op. cit.*, footnote 69.

⁷³ *Ibid.*, For example, consider the cases interpreting the Statute of Frauds.

⁷⁴ See generally, Craies, *Statute Law* (5th ed., 1952); Maxwell, *The Interpretation of Statutes* (11th ed., 1962).

⁷⁵ *Ibid.* See, for example, the way in which the courts of Ontario have interpreted s. 105(2) of the Highway Traffic Act, *supra*, footnote 15, in my comment in (1962), 40 *Can. Bar Rev.* 284.

hostility.⁷⁶ *Heydon's case*⁷⁷ and, eventually, the Golden Rule of statutory construction seemed to point the way to a more liberal approach, but many courts have remained unreceptive to the notion of promoting legislative policies⁷⁸ even where legislation directs them to do so.⁷⁹

Despite this general antipathy toward legislation, the courts have promoted the policy of legislation beyond the fondest hopes of the legislators on occasion. One major example of this is the tendency of courts to impose tort liability for breach of criminal statutes, where on any fair reading of the statute one cannot avoid the conclusion that no language to this effect was included.⁸⁰ In these cases the courts insist that they are merely enforcing the intention of the legislature,⁸¹ although it is now pretty well accepted, except in most judicial pronouncements, that this just is not so.⁸² Nevertheless, the courts continue to pursue "the will o' the wisp of a nonexistent intention".⁸³ Even though the imposition of civil liability has become rather capricious and defies prediction on any rational basis, the courts have clung to the received doctrine very much like the fairy tale Emperor who was afraid to admit that his invisible new clothes did not in fact exist.⁸⁴

The evolution of this sorry state of affairs commenced in 1285 with the passage of the second Statute of Westminster which provided a private remedy by action on the case to those aggrieved by the neglect of statutory duties.⁸⁵ In the six hundred or so years in which this chapter remained in force,⁸⁶ several reported decisions permitted civil recovery for a breach of a statute.⁸⁷ The early principle was enshrined in Comyns' *Digest of the Laws of England* as follows: "So in every case where a statute enacts or prohibits a thing for the benefit of a person he shall have the remedy upon the same statute for the thing enacted for his advantage or for

⁷⁶ See Kilgour, *The Rule Against The Use of Legislative History* (1952), 30 Can. Bar Rev. 769; Davis, *Legislative History and The Wheat Board Case* (1953), 31 Can. Bar Rev. 1.

⁷⁷ (1584), 3 Co. Rep. 7a.

⁷⁸ See Thorne, *The Equity of A Statute and Heydon's Case* (1936), 31 Ill. L. Rev. 202.

⁷⁹ For example, Ontario Interpretation Act, R.S.O., 1960, c. 191, s. 10.

⁸⁰ See Harper and James, *op. cit.*, footnote 1, p. 995.

⁸¹ *Atkinson v. Newcastle Waterworks* (1877), 2 Ex. D. 441.

⁸² Wright, *The English Law of Torts* (1955), 11 U.T.L.J. 84, at p. 94.

⁸³ Harper and James, *op. cit.*, footnote 1, p. 995; Fleming, *op. cit.*, footnote 1, p. 128.

⁸⁴ I am indebted to my colleague Professor H. W. Arthurs for this simile.

⁸⁵ See 13 Edw. I, c. 50; Fricke, *loc. cit.*, footnote 21.

⁸⁶ It was repealed in 1879 by 42-43 Vict., c. 59.

⁸⁷ *Ashby v. White* (1703), Ld. Raymond 938; *Turner v. Sterling* (1683), 2 Vent. 25; *Couch v. Steel* (1854), 3 E and Bl. 402.

the recompense of the wrong done to him contrary to the said law".⁸⁸ But the principle was not as clear as Comyns' articulated; principles never are. In two other cases⁸⁹ it was held that by stipulating for a remedy, the legislature was probably excluding civil liability, and thus, the battle lines were drawn.

In *Couch v. Steel*⁹⁰ the defendant failed to have on board his ship an adequate supply of medicine for the treatment of the crew, which was a breach of a statutory requirement punishable by a penalty which could be recovered by a common informer. Lord Campbell distinguished the earlier cases⁹¹ and said that where a private remedy was supplied in the statute, no liability would be found. Since no provision was made with regard to the right of compensation of the person injured in the instant case, he argued that, unless the legislature expressly removed the common law right of action arising out of the breach of statutory duty, this right would continue to exist.⁹² The court, relying on Comyns' *Digest* and the Statute of Westminster, seemed to have returned to the principle which favoured claimants: unless the legislature provided otherwise, they would be permitted to secure compensation for any damage resulting from a breach of a criminal statute for their benefit which was punishable by fine alone.

The opposite view was taken in the case of *Atkinson v. Newcastle Waterworks Co.*⁹³ in which a statute provided for penalties against water companies which failed to furnish ratepayers with an adequate supply of water. It also provided that a certain amount was forfeited to any ratepayer who was aggrieved. Lord Cairns held that no private remedy was available to the plaintiff whose premises were burnt down because of insufficient water pressure. He mis-stated the holding in *Couch v. Steel* and as mis-stated, he disapproved of it. All persons aggrieved by the non-performance of statutory duties could not automatically have a damage action against the wrongdoer, he remonstrated. Cockburn C. J.^{93A} and Brett L. J.⁹⁴ agreed that *Couch v. Steel* was open to "grave doubts". Chief Justice Campbell, however, did not say that where a *private* remedy was provided in the statute, the common law right would survive; he held that where a *public* remedy alone was stipulated for, that did not erase the private rights. Lord Cairns then laid

⁸⁸ (1800), Vol. 1., p. 317.

⁸⁹ *Stevens v. Jeacocke* (1848), 11 Q. B. 731; *Rochester v. Bridges* (1851), 1 B and Ad. 847, at p. 859.

⁹⁰ *Supra*, footnote 87.

⁹¹ *Supra*, footnote 89.

⁹² *Supra*, footnote 87, at pp. 413-414.

⁹³ *Supra*, footnote 81.

^{93A} *Ibid.*, at p. 448.

⁹⁴ *Ibid.*, at p. 449.

down the principle that whether damages would be payable depended largely "on the purview of the legislature in the particular statute, and the language which they have there employed. . .".⁹⁵ To this statement Lord Campbell would probably have subscribed, as he would have to the actual decision in the *Atkinson* case. This is evidenced by the fact that in *Groves v. Wimborne*,⁹⁶ the court relied on both the *Couch v. Steel* case and the *Atkinson v. Newcastle Waterworks Co.* case in reaching its decision. In the *Groves v. Wimborne* case, a failure to fence machinery as was required by statute led to the infliction of an injury on a workman. In holding the defendant liable, the court uttered the words of Lord Cairns in the *Atkinson* case⁹⁷ but adopted the approach of the *Couch v. Steel* case. The court said that "unless it appears from the whole purview of the act, to use the language of Lord Cairns in the case of *Atkinson v. Newcastle Waterworks Co.*, that it was the intention of the Legislature that the only remedy for the breach of the statutory duty should be by proceeding for the fine, . . . it follows that upon proof of a breach of that duty by the employer and injury thereby occasioned to the workman, a cause of action is established. . .".⁹⁸ The court took no cognizance of the intervening repeal of the section in the second Statute of Westminster with which the tortuous trail began.⁹⁹

These cases are not as violently in conflict as some believe.¹⁰⁰ All insist upon the search for the legislative intention; all agree that if private rights are inserted into the act, common law rights are eclipsed; and all agree that where a penalty alone is provided for, the private rights are not necessarily obliterated. The cases differ primarily in the approach taken, which is, however, significant. In *Couch v. Steel* and *Groves v. Wimborne*, the private rights were to survive unless they were removed by a contrary legislative intention; in the *Atkinson* case, private rights were to expire unless the opposite was demonstrated by a visible legislative intention. The position has not been clarified to the present day¹⁰¹ permitting courts to select the approach which will enable them to reach the result they desire.¹⁰² This may be most convenient for those who wish to disguise the true reasons for judicial de-

⁹⁵ *Ibid.*, at p. 448.

⁹⁶ [1898] 2 Q. B. 402.

⁹⁷ *Ibid.*, at p. 407.

⁹⁸ *Ibid.*

⁹⁹ *Supra*, footnote 86.

¹⁰⁰ Fricke, *op. cit.*, footnote 21, at p. 260.

¹⁰¹ Street, *Torts* (2nd ed., 1959), p. 273.

¹⁰² *Cf.* Approach taken in *Cutler v. Wandsworth Stadium*, [1949] A.C. 398 and that taken in *Monk v. Warbey*, [1935] 1 K.B. 75.

cisions, but it is totally unsatisfactory to explain, to rationalize or to predict the outcome of these cases.

V. *Legislative Intention: Myth or Reality.*

There are a few rare instances where civil liability is expressly created by legislation. Here, of course, the pursuit of the legislative intention is the proper method of attack. The Railway Act of Canada¹⁰³ expressly confers a cause of action on anyone injured by a breach of certain of its provisions. Similarly, a breach of the Safety Appliance Act of the United States creates civil liability expressly.¹⁰⁴ There are other examples including the responsibility of the owner of a motor vehicle for damage resulting from its use,¹⁰⁵ the liability for breach of the Taft-Hartley Act by engaging in secondary picketing and jurisdictional and recognition strikes,¹⁰⁶ the civil responsibility of individuals who run afoul of anti-trust legislation,¹⁰⁷ abutters who fail to clear the public sidewalks in front of their property¹⁰⁸ and others.¹⁰⁹ In still fewer situations liability for breach of a criminal statute is expressly excluded.¹¹⁰ But the express provision dealing with civil liability is the exception rather than the rule and judges and authors have complained of this.¹¹¹

In the majority of cases, the legislation gives no explicit guidance with regard to civil liability. Rather than holding that the legislature had no intention qua civil liability since it expressed none,¹¹² the courts have continued to seek this non-existent legislative intention. They have concentrated on the penalty that is provided in the statute or the lack of it. If no criminal sanction is included in the legislation, the courts have concluded that the legislature must have intended that civil liability be imposed

¹⁰³ R.S.C., 1952, c. 234, s. 413(3).

¹⁰⁴ See (1946), 45 U.S.C., s. 13; *Chicago R.R. v. Schendel* (1924), 267 U.S. 287; *Daggett v. Keshner* (1954), 284 App. Div. 733, 134 N.Y.S. 2d 524.

¹⁰⁵ See Ontario Highway Traffic Act, *supra*, footnote 15, s. 105(1); California Vehicle Code (1959), §17150.

¹⁰⁶ See (1947), 29 U.S.C., s. 187, s. 303(b) and Arthurs, *Tort Liability for Strikes in Canada* (1960), 38 Can. Bar Rev. 346, at p. 361.

¹⁰⁷ For example, Sherman Act suits for treble damages. See 15 U.S.C.A. §1-7 (1890).

¹⁰⁸ See ordinances in *Willis v. Parker* (1919), 225 N.Y. 159, 121 N.E. 810; *Texas Co. v. Grant* (1944), 143 Tex. 145, 182 S.W. 2d 996.

¹⁰⁹ See Mines Act of Victoria (1958), s. 411(1).

¹¹⁰ For example, see Ontario Highway Traffic Act, *supra*, footnote 15, s. 105(2).

¹¹¹ Lord Du Parcq in *Cutler v. Wandsworth Stadium*, *supra*, footnote 102, at p. 410; Fricke, *loc. cit.*, footnote 21.

¹¹² As suggested by Lowndes, *loc. cit.*, *ibid.*

because otherwise the statute would be only a "pious aspiration".¹¹³ Some earlier cases had indicated that where a penalty was provided, it was the only remedy available,¹¹⁴ but these cases have not been uniformly followed.¹¹⁵ If the injured party is able to recover the penalty himself rather than the state alone, the courts lean to the view that no additional recovery at common law should be allowed.¹¹⁶ This is probably the explanation for the *Atkinson* decision¹¹⁷ although Brett L. J. insisted that it made no difference.¹¹⁸ This conclusion was disagreed with, however, in at least one decision where the court felt that merely because an informer could collect the penalty, the legislature had not necessarily intended to remove other potential civil remedies.¹¹⁹

Some courts have engaged in a futile assessment of the adequacy of the penalties provided in order to discover the true intention of the legislature. Where the penalty is a severe one, they normally hold that the legislature intended that as the sole remedy,¹²⁰ and where the penalty is small, courts have tended to decide that the legislature must have intended civil liability to be imposed as an additional sanction.¹²¹ This latter statement has not gone unchallenged, and in one case the court indicated that where only a small penalty was imposed, it might indicate a benevolent legislative attitude toward the defendant rather than the intention that additional civil liability be imposed.¹²²

The courts have utilized other legislative interpretation devices in their quest for the intention of the legislature, but these have yielded equally unsatisfactory results. For example, the court may rely on the title or the preamble of the statute to give it a clue as to the legislative intention. The Factories and Shops Act¹²³ is one

¹¹³ See Lord Simonds in *Cutler v. Wandsworth Stadium*, *supra*, footnote 102, at p. 407; *Attorney-General v. St. Ives R.D.C.*, [1959] 3 All E.R. 371 (Q.B.D.).

¹¹⁴ For example, see *Stevens v. Jeacocke*, and *Rochester v. Bridges*, *supra*, footnote 89; *Brain v. Thomas* (1881), 50 L.J. Q.B. 662.

¹¹⁵ See for example, *Couch v. Steel*, *supra*, footnote 87; *Groves v. Wimborne*, *supra*, footnote 96.

¹¹⁶ *Simmonds v. Newport & Co.*, [1921] 1 K.B. 616; *Fahey v. Jephcott* (1901), 2 O.L.R. 449, at p. 453; *Mack v. Wright* (1897), 180 Pa. 472, 36 Atl. 913; *Town of Battleboro v. Wait* (1872), 44 Vt. 459; *Irvine v. Metropolitan Transport*, [1933] O.R. 823, 4 D.L.R. 682.

¹¹⁷ *Supra*, footnote 81.

¹¹⁸ *Ibid.*, at p. 441.

¹¹⁹ See Lord Chelmsford in *Wilson v. Merry* (1868), L.R. 1 H.L. (S.C.) 326, at p. 341.

¹²⁰ *Cutler v. Wandsworth Stadium*, *supra*, footnote 102 at p. 414.,

¹²¹ *Irvine v. Metropolitan Transport*, *supra*, footnote 116; *O'Connor v. Bray* (1937), 56 C.L.R. 464, at p. 486.

¹²² *Commerford v. Board of School Commissioners*, *supra*, footnote 17, at p. 218.

¹²³ Factories and Shops Act, 1912 (N.S.W.), No. 39.

example where the purpose of the statute according to its preamble is the "extension of the liability of employers for injuries suffered by employees in certain cases",¹²⁴ and where the court might well find an intention to confer a civil cause of action. When some breaches of legislative provisions in a statute are expressly made to create civil liability, the court will probably refuse to impose civil liability for breaches of any other provisions in the absence of clear words to that effect,¹²⁵ relying on the canon of construction *expressio unius est exclusio alterius*.¹²⁶ On occasion the court has fastened onto imperative words such as "shall provide" and imposed liability for any failure so to provide.¹²⁷ Other such devices have been invoked.

It should be apparent by now that it is futile to rely on the so-called legislative intention with regard to civil liability in all but a very few cases. Most of the authors¹²⁸ have seen that this was a meaningless hunt and even a few judges¹²⁹ have expressed this view. Chief Justice Owen Dixon was probably the most ingenuous when he pointed out in *O'Connor v. Bray*¹³⁰ that this exercise was probably more a matter "governing the policy of the provision rather than the meaning of the instrument". Justice Trueman, in a dissenting judgment in *Wasney v. Jurazsky*,¹³¹ remarked that it was not the Criminal Code which created the civil liability for its breach but the common law rules. In *Placatka v. Thompson*,¹³² the court confided that the civil right arises under provincial law and not out of the breach of the regulations under the federal Explosives Act, and in *Lochgelly Iron & Coal v. McMullan*,¹³³ Lord Wright recognized as well, that it was the common law which gave the right of action for a private injury flowing from a breach of a criminal statute. But these few instances stand almost alone in the midst of scores of cases on this topic which blindly proclaim that they are seeking the legislative intention. Until this psychotic quest for the non-existent intention is ab-

¹²⁴ See Fricke, *loc. cit.*, footnote 21, at 257.

¹²⁵ *Commerford v. Board of School Commissioners*, *supra*, footnote 17.

¹²⁶ See *Toronto-St. Catherine's Transport v. Toronto*, [1954] 1 D.L.R. 721 (S.C.C.), Mr. Justice Rand, at p. 731, Mr. Justice Kellock, at p. 732, and Mr. Justice Estey, at p. 737.

¹²⁷ *Read v. Croydon Corp.*, [1938] 4 All E.R. 631.

¹²⁸ Fleming, *op. cit.*, footnote 1, p. 128; Prosser, *op. cit.*, footnote 1, p. 192; Harper and James, *op. cit.*, footnote 1, p. 995; Wright, *loc. cit.*, footnote 82; Lowndes, *loc. cit.*, footnote 21; Alexander, *loc. cit.*, footnote 21; Thayer, *loc. cit.*, footnote 21; Morris, *loc. cit.*, footnote 21.

¹²⁹ Justice Dixon, for example, in *O'Connor v. Bray*, *supra*, footnote 121.

¹³⁰ *Ibid.*, at p. 478.

¹³¹ *Supra*, footnote 30.

¹³² [1941] 2 D.L.R. 320, at p. 324 (Alta. C.A.).

¹³³ [1934] A.C. 1, 22.

andoned by courts,¹³⁴ these cases will remain a mystery. Reliance on alternative presumptions and examination of the severity of the penalty provisions yield only unsatisfactory results; other interpretation devices lend assistance only in relatively few instances. There must exist some other unexpressed reasons to explain the courts' persistence in the application of criminal statutes in civil cases. An examination of the cases will now be undertaken in order to discover what these underlying reasons are.

VI. *Breach of Legislation which Creates New Duties Where None Existed at Common Law.*

The courts and some of the authors have generally not distinguished between statutes which are used to create new duties where none existed at common law and statutes setting specific standards of care where duties were already recognized.¹³⁵ The courts have invoked the legislative intention doctrine as the technique utilized to resolve both problems alike.

The courts' failure to differentiate between these divergent uses of criminal legislation has resulted in the recognition of new tort duties, where a complete understanding of the issue and a candid appraisal of the conflicting policies may have led to another conclusion. Since to create a new tort duty is a more serious step than merely to crystallize the standard of care to be used where a duty already exists, courts might be expected to be more reluctant to engage in the former operation through the use of criminal statutes.¹³⁶ In minimizing the importance of judicial use of legislation to concretise the standard of care by explaining it as a mere procedural change, and in opposing its use to create new duties, Thayer may have been motivated by a fear of judicial opposition to any use of statutes whatsoever. He may have been attempting to win at least some recognition for criminal legislation in tort cases in an atmosphere of pervading judicial hostility. By limiting his objectives, some progress might be made, whereas, if he advocated reliance on legislation to create new duties, as well as to set standards, all might be lost. Better to take half a step than not to take any step at all.

¹³⁴ Alexander, *loc. cit.*, footnote 21, at p. 276, is not very optimistic about this eventuality coming to pass.

¹³⁵ Salmond, *op. cit.*, footnote 26, p. 467; Charlesworth, *op. cit.*, footnote 26, p. 951; Fricke, *loc. cit.*, footnote 21. Cf. Morris, *loc. cit.*, footnote 21; Gregory, *loc. cit.*, footnote 21; Thayer, *loc. cit.*, footnote 21; Alexander, *loc. cit.*, footnote 21; Williams, *loc. cit.*, footnote 21.

¹³⁶ See Alexander, *loc. cit.*, *ibid.*, at pp. 255-256.

There are several policy reasons which favour the use of criminal statutes to create new tort duties. Most important of these is the argument for comity which holds that in a democratic society the policies enunciated in legislation should be given proper respect by the judiciary.¹³⁷ Legislation is the product of the elected representatives of the people whereas judges are appointed and are not as responsive to the popular will. Somewhat related to this line of reasoning is the contention that legislatures, with their large facilities for research and investigation, may be better qualified than courts to make informed value judgments. Courts should give considerable weight to legislative enactments which reflect this superior expertise.¹³⁸ Some people suggest that a civil sanction should be added to the penalty provided by the legislature as an additional deterrent which will motivate the observance of the legislation, thus affording better protection to that segment of society which the legislature wished to protect.¹³⁹ This supplementary sanction may also assist in flushing out more of those who violate the legislation since the profit motive of a tort judgment may encourage would-be informers, and people are more likely to report wrongdoing if they have some financial stake in so doing.¹⁴⁰ By refusing to punish wrongdoing by means of a tort judgment as well as a criminal penalty, it may appear that the court is sanctioning criminal conduct. To avoid being placed in this position, courts may be tempted to impose civil liability as an additional punishment to those who breach the criminal law.¹⁴¹ Lastly, if courts are so inclined, they may expand the frontiers of the law into new areas heretofore untouched by civil liability by analogy to these criminal statutes.¹⁴²

Countervailing policy arguments are available against the imposition of tort liability in addition to criminal liability. Although courts should give full effect to the commandments of the legislature, they should proceed no further than the legislature commanded, since it chose not to impose civil liability for breach of the legislation which it might easily have done.¹⁴³ The democracy

¹³⁷ See Thayer, *loc. cit.*, footnote 21.

¹³⁸ Fleming, *op. cit.*, footnote 1, p. 135; Morris, *loc. cit.*, footnote 21, at p. 48.

¹³⁹ Pollock, *Law of Torts* (14th ed., 1939), p. 20.

¹⁴⁰ Fricke, *loc. cit.*, footnote 21.

¹⁴¹ Since after all "the law is disobeyed", see Pollock, *op. cit.*, footnote 139, p. 20; See also Thayer, *loc. cit.*, footnote 21, p. 283 in *Selected Essays, op. cit.*, footnote 2.

¹⁴² Morris, *loc. cit.*, footnote 21.

¹⁴³ Thayer, *loc. cit.*, footnote 21, p. 290 in *Selected Essays, op. cit.*, footnote 2.

argument cuts the other way here, and precludes the court from superimposing its wishes over those expressed by the elected legislature.¹⁴⁴ It might be contended that it is unfair to hold someone civilly liable for his conduct without some prior warning being issued. Morris has indicated that this complaint is invalid since the criminal law has declared in advance that certain conduct would subject the violator to some criminal sanction, so that he is not caught completely off-guard.¹⁴⁵ It is also suggested that the conduct required or prohibited may be difficult to enforce, but Morris has shown that this is unlikely, since the legislature, which must have studied this aspect of the matter, has decided that it was capable of enforcement. Because many of these new crimes have been enacted by inferior bodies, such as municipalities and administrative agencies, and because of the judicial distrust of these bodies, the courts have resisted the addition of civil liability to the criminal penalties laid down.¹⁴⁶ Criminal statutes may be unwisely severe, and to impose potentially ruinous civil liability for their breach is unfair¹⁴⁷ and smacks of double jeopardy. Finally, and probably most importantly, is the age-old argument about the danger of expanding liability and of providing new remedies. Thayer has said that "it is a dubious and a dangerous thing for the courts to speculate as to unexpressed legislative intent and create private remedies by implication".¹⁴⁸ This is, of course, the floodgates argument that is dredged up whenever the "timorous souls" attempt to block the "bold spirits" from developing the common law.¹⁴⁹ Tangentially, the phobia about strict liability and the judicial struggle to confine its operation lurks in the background.¹⁵⁰ By the adoption of a legislative standard, fault liability is thought to be abandoned and replaced by strict liability.¹⁵¹ But this does not necessarily follow. The court has on at least one occasion created a new duty based on a breach of statute which

¹⁴⁴ *Ibid.*

¹⁴⁵ Morris, *loc. cit.*, footnote 21, p. 144 in Studies.

¹⁴⁶ See, for example, the attitude of Lord Atkin in *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832.

¹⁴⁷ Morris, *loc. cit.*, footnote 21, p. 144, in Studies, *op. cit.*, footnote 25.

¹⁴⁸ Thayer, *op. cit.*, footnote 21, p. 290 in Selected Essays, *op. cit.*, footnote 2.

¹⁴⁹ See Lord Justice Denning in *Candler v. Crane, Christmas, & Co.*, [1951] 2 K.B. 164, 1 All E.R. 426.

¹⁵⁰ See *Read v. Lyons & Co.*, [1947] A.C. 156, 2 All E.R. 471, and see Fleming, *op. cit.*, footnote 1, p. 308.

¹⁵¹ Fleming, *op. cit.*, *ibid.*, p. 135; *Maharsky v. C.P.R.* (1904), 15 Man. R. 53, at p. 80 (C.A.); *Phillips v. Britannia Hygienic Laundry Co.*, *supra*, footnote 146.

required only reasonable care of those who were held subject to that duty.¹⁵²

These are the conflicting policies that the court must balance prior to reaching a decision as to whether it should create a new tort duty based on a criminal statute or whether it should refuse to do so. All the talk about legislative intention only screens the real bases of decision. The existence of a criminal statute is one of the factors that courts will assess along with the other conflicting policies whether this is admitted openly or not. An analysis of several groups of cases where the courts have created new tort duties based on criminal statutes will now be made. The attempt will be made to discover which of these policy reasons motivated the courts in their resolution of the cases. First, the compulsory insurance legislation cases will be discussed, then the "hit and run" cases, followed by the family support decisions, the abutter cases, and finally other assorted situations will be examined.

1. *Compulsory insurance legislation.*

The Columbia Report in 1932 estimated that an injured plaintiff had only about a twenty-five per cent chance of recovering anything from an uninsured motorist, whereas, if the motorist defendant was insured, he had about an eighty-five per cent chance of securing some compensation.¹⁵³ There are still over 10,000,000 uninsured vehicles in the United States, which if involved in accidents may lead to tort judgments amounting to empty shells.¹⁵⁴ Since a similar situation existed in the British Commonwealth, there was a need for legislative action to improve the plight of those injured by uninsured drivers. Among the devices used were the imposition of civil liability on the owner of a vehicle involved in an accident,¹⁵⁵ financial responsibility laws¹⁵⁶ and unsatisfied judgment funds.¹⁵⁷ A few jurisdictions resorted to the more drastic compulsory liability insurance legislation which made it a crime to drive an automobile that was uninsured.¹⁵⁸ The primary

¹⁵² *Read v. Croydon*, *supra*, footnote 127, at p. 651.

¹⁵³ Committee to Study Compensation for Automobile Accidents Report to the Columbia University Council for Research in Social Sciences (1932).

¹⁵⁴ Prosser, *op. cit.*, footnote 1, p. 578.

¹⁵⁵ Ontario Highway Traffic Act, *supra*, footnote 15, s. 105(1).

¹⁵⁶ N.Y. Vehicle and Traffic Law, Art. 6, §310-321.

¹⁵⁷ See Ontario Motor Vehicle Accident Claims Act, 1961-62, S.O., 1961-62, c. 84; N.J. Laws, 1952, c. 174; Similar legislation has been adopted in other American states as well.

¹⁵⁸ *E.g.*, Mass. Ann. Laws, c. 90; N.Y. Vehicle and Traffic Law, § 310; N.C. Sess. Laws of 1957, c. 1393; United Kingdom. see *infra*; Australia, see Fleming, *op. cit.*, footnote 1, p. 356.

object of these laws was to ensure the existence of a fund out of which a plaintiff could satisfy any potential judgment, at least to the dollar limits required. Only incidentally were they to benefit a solvent defendant who might be mulcted in damages, although this was an inevitable by-product.

Prior to the passage of these statutes, there was no civil duty to insure oneself against public liability in order to provide a potential claimant with a financially solvent defendant. As a result of the enactment of this criminal legislation, the English courts created a new civil obligation toward a third person who was injured by an uninsured vehicle. Section 35(1) of the Road Traffic Act of 1930¹⁵⁹ provided that ". . . it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle. . . such a policy of insurance. . . as complies with the requirements of this part of the Act." Subsection 2 provided for the penalty of a fine not exceeding fifty pounds, a prison term not exceeding three months, or a license disqualification for a period of twelve months unless otherwise ordered. Subsection 4 allowed the owner to deposit 15,000 pounds with the court accountant in lieu of securing insurance. Another statute created a right in the third party to sue the defendant's insurance company after judgment was secured in the event of their default of payment, thus, overcoming the third party beneficiary problem.¹⁶⁰

The celebrated and much impugned case of *Monk v. Warbey*¹⁶¹ was the decision which created the new civil duty to insure by analogy to the criminal statute. The defendant Warbey permitted his motor vehicle to be used by Knowles who allowed a third person, May, to use it. Although the owner himself was insured against third party risks neither Knowles nor May were. May negligently caused injury to the plaintiff Monk who sued Knowles, May and Warbey. When interlocutory judgments were secured against Knowles and May, they were unable to satisfy them, and the matter proceeded against Warbey on the theory that his breach of the statute gave rise to civil liability on his part. The trial judge accepted this view and he was affirmed by the Court of Appeal.

Lord Justice Greer selected the approach of *Groves v. Wimborne*¹⁶² and said that unless a contrary view was expressed in the statute, a civil obligation was conferred by the breach of a criminal

¹⁵⁹ 20 & 21 Geo. 5, c. 43.

¹⁶⁰ Third Parties (Rights Against Insurers) Act, 1930, 20 & 21 Geo. 5, c. 25.

¹⁶¹ *Supra*, footnote 102.

¹⁶² *Supra*, footnote 96.

statute. He formulated the principle as follows: "*Prima facie* a person who has been injured by a breach of a statute has a right to recover damages from the person committing it unless, it can be established by considering the whole of the Act that no such right was intended to be given. So far as that being shown in this case, the contrary is established."¹⁶³ Two of the judges purported to rely on subsection 4 as evidence of a legislative intention to confer civil rights.¹⁶⁴

But the real reason for the decision was not the interpretation exercise engaged in by the court. It was the desire to advance the legislative policy of protecting the people injured in automobile accidents by supplying them with an insurance fund out of which to recover any judgment which they might secure. Supplementary to this, was the feeling that the criminal sanction was inadequate to effectuate this purpose. Lord Justice Greer said:¹⁶⁵ "[S.] 35 . . . would indeed be no protection to a person injured by the negligence of an uninsured person to whom a car had been lent by the insured owner, if no civil remedy were available for a breach of the section." His Lordship further stated that: "To prosecute for a penalty is no sufficient protection and is poor consolation to the injured person though it affords a reason why persons should not commit a breach of the statute."¹⁶⁶ This reasoning was echoed by Lord Justice Maugham when he said:¹⁶⁷ ". . . s. 35 was passed for the purpose of giving a remedy to third persons who might suffer injury by the negligence of an impecunious driver of a car . . ." and further¹⁶⁸ ". . . when the Act was passed it was within the knowledge of the Legislature that negligence in the driving of cars was so common an occurrence that the likelihood of injury to third persons that it was necessary in the public interest to provide machinery whereby those third persons might recover damages". Because the court was sympathetic to the legislative policy of protecting persons injured by uninsured drivers, it added a new civil duty to provide insurance coverage to the regular criminal sanction. The language of legislative interpretation was only a cloak that shielded only imperfectly the judicial desire to buttress the policy of the statute.

This decision has been attacked by Glanville Williams as "an improper type of judicial invention".¹⁶⁹ Fleming has described it

¹⁶³ *Ibid.*, at p. 81.

¹⁶⁴ *Ibid.*, Roche L. J., at p. 86, Maugham L.J., at p. 86.

¹⁶⁵ *Ibid.*, at p. 80.

¹⁶⁶ *Ibid.*, at p. 81.

¹⁶⁷ *Ibid.*, at p. 85.

¹⁶⁸ *Ibid.*, at p. 86.

¹⁶⁹ *Loc. cit.*, footnote 21, at p. 259.

as "a most blatant arrogation of legislative authority", as being "difficult to justify on any account",¹⁷⁰ and as an example of judicial discretion being stretched "beyond . . . legitimate bounds".¹⁷¹ At the same time, without seeing the inconsistency in his position, he argues that it is easy and proper to infer a legislative intention to create private rights from statutes which set specific safety standards.¹⁷² If it is proper to conjure up a fictional legislative intention to fix the standard of care, it is no less proper to do likewise to create a new duty of care. Both are disingenuous tactics invoked by courts to reach certain desired conclusions. Probably, the true reason for Fleming drawing this distinction is that he, like Thayer, does not want to risk encountering more solid judicial reaction to the use of all criminal statutes in tort cases. Fleming also expresses the view that legislation should not be used to create new duties of care because "the jump from ordinary negligence to strict liability is one thing, that from no duty to strict liability is quite another",¹⁷³ again evincing his fear of a total judicial rejection of legislation if too much is sought to be done thereby. It is not necessary, however, to go from no duty to strict liability; the court may create a duty to use only reasonable care on the basis of a statute.¹⁷⁴ While both of these reasons may have been grounds for advising caution in the early part of this century, criminal legislation is relied upon now in tort cases and the courts should no longer be prevented from creating new civil duties by analogy to criminal statutes in proper cases.

Despite these criticisms, *Monk v. Warbey* appears to be well entrenched in English law, having received the imprimatur of the House of Lords in *McLeod (or Houston) v. Buchanan*,¹⁷⁵ and is no longer even questioned by counsel.¹⁷⁶ Lord Wright stated that "the provision is an important element in the policy of the legislature to secure the benefit of insurance for sufferers of road accidents".¹⁷⁷ He spoke of the provision being "imperative" and "precise" and of the "wrongdoing motor vehicle"¹⁷⁸ indicating that he was relying on the so-called intention of the legislation and, perhaps, on the need for an additional penalty to punish the defendant.

¹⁷⁰ *Op. cit.*, footnote 1 (2nd ed., 1961), p. 134, footnote 11.

¹⁷¹ *Op. cit.*, *ibid.*, (3rd ed., 1964), p. 130.

¹⁷² *Ibid.*

¹⁷³ *Op. cit.*, footnote 170, p. 133. This sentence does not appear in the third edition.

¹⁷⁴ *Read v. Croydon*, *supra*, footnote 152.

¹⁷⁵ [1940] 2 All E.R. 179.

¹⁷⁶ *Ibid.*, at p. 186.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

There are some limits on the scope of operation of *Monk v. Warbey* in that only an owner can be held civilly liable and not an auctioneer,¹⁷⁹ nor anyone who merely assisted another to breach the section,¹⁸⁰ since the owner alone has enough control over the motor vehicle to forbid its unlawful use.¹⁸¹ It has been held that this provision has not been passed for the benefit of a servant of the uninsured owner, but for the benefit of third parties.¹⁸² In one case, the plaintiff failed to recover against an owner who was in breach of the statute since the cause of his loss was not the lack of insurance but the delay of the plaintiff in the prosecution of his claim.¹⁸³

The decision of *Monk v. Warbey* stands as one well-settled example of a case in which a new tort duty was established on the basis of a breach of criminal legislation, because the court wished to promote the policy enshrined in the statute.

2. *Hit and run statutes.*

In recent years many jurisdictions have enacted criminal legislation requiring motorists who have been involved in accidents to stop, give their name and address and to render assistance.¹⁸⁴ The multiple purposes of this legislation is to enforce Good Samaritanism and to prevent the evasion of criminal and civil responsibility. In the United States, this legislation has led to the creation of a new tort duty to render aid in addition to any criminal duty which may exist.

One must distinguish between the situation where the driver of the vehicle was at fault and where he was not at fault for the original accident. The driver was under a duty at common law to render assistance in order to minimize any injury *tortiously* inflicted,¹⁸⁵ but prior to the passage of this legislation, no duty to render aid was recognized where the driver *innocently* created the

¹⁷⁹ *Watkins v. O'Shaughnessy*, [1939] 1 All E.R. 385 (C.A.).

¹⁸⁰ *Goodbarne v. Buck*, [1940] 1 K.B. 771, 1 All E.R. 615 (C.A.).

¹⁸¹ *Ibid.*

¹⁸² *Semsex Ltd. v. Gladstone*, [1954] 1 W.L.R. 945; *Gregory v. Ford*, [1951] 1 All E.R. 121.

¹⁸³ *Daniels v. Vaux*, [1938] 2 K.B. 203, 2 All E.R. 271.

¹⁸⁴ See, for example, Canadian Criminal Code, *supra*, footnote 18, s. 110, "offer assistance"; Ontario Highway Traffic Act, *supra*, footnote 15, s. 143(a), "render all possible assistance"; Calif. Vehicle Code, §20003, "render to any person injured in the accident reasonable assistance"; Ind. Rev. Statutes 1934, §11171, "render or offer to render assistance".

¹⁸⁵ *Prosser, op. cit.*, footnote 1, p. 338; Restatement of the Law of Torts, §322; *Racine v. C.N.R.*, [1923] 1 W.W.R. 1439, 2 D.L.R. 572, 19 Alta. 529 (C.A.); *Trombley v. Kolts* (1938), 29 Cal. App. 2d 699; *N. Central R.R. Co. v. Price* (1868), 29 Md. 420, 96 Am. Dec. 545.

initial peril.¹⁸⁶ The enactment of this hit and run legislation has altered all that by spurring the creation of a civil duty to render assistance even where the initial injury is innocently caused by the driver.

The distinction of being the first state to recognize this new civil duty goes to Louisiana. In *Langenstein v. Reynaud*,¹⁸⁷ judgment went against a defendant who failed to stop after colliding with a pedestrian in violation of a hit and run statute. The death of his victim was either caused or hastened when a second automobile collided with him while he lay helpless on the road. The court stated that if the defendant had stopped and removed the victim to a place of safety, as the law directed, the second accident would not have occurred.¹⁸⁸ The only reason given for the decision was that: "He certainly knew in his conscience that he was doing wrong in fleeing from the scene of the accident, leaving his victim prostrate in the street. . . ." ¹⁸⁹ Liability in tort was just assumed, although a possible rationale for the case may have been the desire to inflict additional punishment on any evil person who flees from the scene of an accident. Unfortunately, the facts of the case would indicate that the defendant was at fault for the accident initially, which may explain the failure of the court to deal at length with the legislation issue.

Shortly thereafter, in *Battle v. Kilcrease*,¹⁹⁰ the Georgia Court of Appeals expressed the view that no error was committed when the jury was charged to the effect that they could find negligence as a matter of law where someone failed to stop contrary to a statutory provision. A verdict for the plaintiff was upheld, but the court failed to cite one case or give any reason for their decision. Again, the facts appear to manifest some initial negligence by the defendant.¹⁹¹

California joined the parade soon after, and in *Summers v.*

¹⁸⁶ Prosser, *op. cit.*, *ibid.*, p. 338; Restatement of the Law of Torts, §322, Caveat; *Union Pacific v. Cappier* (1903), 66 Kan. 649, 72 P. 281; *Turbeville v. Mobile Light & R. Co.* (1930), 121 Ala. 91, 127 So. 519. There is some slim authority to indicate that if peril is innocently created, there may be a duty to minimize ensuing damage, Prosser, *ibid.*, p. 338 and *Ayres & Co. v. Hicks* (1942), 220 Ind. 86, 40 N.E. 2d 334.

¹⁸⁷ (1930), 13 La. App. 272, 127 So. 764 (C.A.).

¹⁸⁸ *Ibid.*, at p. 766 (So.).

¹⁸⁹ *Ibid.*

¹⁹⁰ (1936), 54 Ga. App. 808, 189 S.E. 573.

¹⁹¹ The case seems to declare that there is no necessity for proof of additional harm resulting from the failure to render aid, but the case really turned on the punitive damages point and the issue of whether breach of this statute could be evidence of original negligence. See *infra*. Cf. *Petroleum Carrier Corp. v. Snyder* (1947), 161 F.2d 323 (5th Cir.), where no liability, because no evidence of additional damage.

Dominguez,¹⁹² declared in a *dictum* that a separate civil action could be maintained for the wilful breach of a statutory duty to render aid regardless of any negligence of the plaintiff which may have contributed to the initial injury.¹⁹³ The court again did not articulate any reasons for the decision.

In *Hallman v. Cushman*,¹⁹⁴ the Supreme Court of South Carolina indicated that it would allow a jury to consider evidence of the failure to stop contrary to a statute which increased the pain suffered by an injured person with a view to the assessment of additional damages. The case turned largely on other matters, however.

Probably the leading case is *Brooks v. E. J. Willig Transport Co.*,¹⁹⁵ in which the court upheld a jury instruction to the effect that knowingly to refuse to stop after an accident, which proximately caused the death of the plaintiff, was a breach of a civil duty which did not depend on the negligence of the driver, nor on the freedom from contributory negligence by the victim. Chief Justice Gibson stated the principle as follows: "One who *negligently* injures another and renders him helpless is bound to use reasonable care to prevent any further harm which the actor realizes or should realize threatens the injured person. This duty existed at common law although the accident was caused in part by the negligence of the person who was injured. . . . Sections 480 and 482 of the Vehicle Code (now 20001 and 20003) require an automobile driver who injures another to stop and render aid. *This duty is imposed upon the driver whether or not he is responsible for the accident, and a violation gives rise to civil liability if it is a proximate cause of further injury or death.*"¹⁹⁶ The court did not favour posterity with any reasons for its decision, nor did it even cite the earlier case of *Summers v. Dominguez*,¹⁹⁷ decided in the same state.

Prosser claims that this case suggests that the duty to render assistance may exist at common law even in the absence of the fault of the driver.¹⁹⁸ It is submitted that he is in error. A careful reading of the case will demonstrate that the court recognized the duty to render aid at common law only where one *negligently*

¹⁹² (1938), 29 Cal. App. 2d 308, 84 P.2d 237 (D.C.A.).

¹⁹³ The plaintiff ultimately did not have to rely on this proposition and removed it from his pleading, allowing his case to rest solely on the negligence which caused the original accident.

¹⁹⁴ (1941), 196 S.C. 402, 13 S.E. 2d 498.

¹⁹⁵ (1953), 40 Cal. 2d 669, 255 P.2d 802.

¹⁹⁶ *Ibid.*, at pp. 808-809. Italics mine.

¹⁹⁷ *Supra*, footnote 192.

¹⁹⁸ *Op. cit.*, footnote 1, p. 338.

injured another. However, since the criminal statute did not differentiate between the case where there was negligence in bringing about the original injury and where there was not, the court followed the criminal law and imposed civil liability on the driver for failure to render aid "whether or not he is responsible for the accident".¹⁹⁹ It is suggested that the word "responsible" here means "legally responsible," which the defendant would not be, unless he was at fault. Thus, the Supreme Court of California was prepared to utilize the hit and run statute to create a new duty to render aid even in the absence of any initial negligence causing the injury, although on the evidence, there was a strong likelihood that the driver had been negligent originally.

West Virginia and Texas have also recognized this new duty. In *Brumfield v. Wofford*,²⁰⁰ the West Virginia Supreme Court of Appeals refused to strike out an allegation of failure to stop and render assistance in violation of a statute without giving reasons and without citing any authorities for this view. The Texas court followed suit in *Boyer v. Gulf, C. & S. F. R. Co.*,²⁰¹ even though it had to dismiss the action for lack of evidence which would show that the failure to stop proximately caused the death of the plaintiff. In the case, a train had killed the plaintiff's wife at a crossing, but the employees of the railway were guilty of no negligence with regard to the accident. Texas did not adhere to the rule which requires one to render aid if he brings about an injury, even in the absence of fault.²⁰² Despite this, the Texas court relied on the *dicta* in the *Brooks* and *Summers* cases, and ruled that breach of the hit and run statute imposed a civil duty to render assistance. Again, no policy reasons were offered by the court.

The policy reasons which generated the creation of the new duty to aid in hit and run cases, although unarticulated by the courts, are fairly obvious. The civil courts are assisting the legislative policy of promoting Good Samaritanism on the highways where many thousands are killed and injured each year.²⁰³ By imposing the further sanction of civil liability, the courts may hope to reduce the incidence of hit and run violations, saving a few lives and diminishing some suffering. It may be that the courts wish to wreak vengeance on the evil men who disobey the statute with an ad-

¹⁹⁹ *Brooks v. E. J. Willig Transport Co.*, *supra*, footnote 195, at p. 808.

²⁰⁰ (1958), 143 W. Va. 332, 102 S.E. 2d 103.

²⁰¹ (1957), 306 S.W. 2d 215 (Tex. Civ. App.).

²⁰² *Ibid.*, at p. 295.

²⁰³ In Canada over 4,000 people are killed and over 100,000 are injured annually. In the United States of America over 40,000 are killed each year.

ditional sanction. The moral repugnance felt toward these people is not disguised.²⁰⁴ The fact that courts rely upon proof of a breach of hit and run statute as evidence that the original accident was negligently caused,²⁰⁵ and the fact that they permit punitive damages to be awarded in these circumstances, lend some credence to this view.²⁰⁶ The statute provides the courts with a convenient mechanism through which to expand liability for nonfeasance. This development has been made easier by the widespread insurance coverage for automobile liability which ensures that potential victims will in all likelihood be compensated by the insurance fund. The close resemblance of these facts to the cases where the defendant negligently caused injury and to the cases where the defendant controlled an instrumentality which caused it, may have facilitated a smooth transition to the creation of liability. So too, the absence of any administrative problems, such as the selection of the individual who is to be responsible, may have helped the courts to overcome any latent misgivings. In any event, a new civil duty has been created in the hit and run cases, to render aid even where there is no initial fault on the part of the driver, ostensibly by analogy to the criminal statute. It is true that in all the cases, the statements of the judges were probably only *dicta*, but these pronouncements have been strong and clear and have remained unchallenged by either authors or judges. It appears that this new duty will survive and prosper in the years ahead.

3. Family support legislation.

We have already seen that there is no duty to feed a starving man, to give water to one dying of thirst on the desert, to clothe one who is freezing or to secure medical attention to one who is bleeding to death. He who fails to supply any of these things may have to answer to his maker but need not answer to the law.²⁰⁷ This was so even in the case of parent and child.²⁰⁸ In recent years, however, there has been a change of attitude where there is a family relation involved. Criminal legislation has been enacted requiring fathers to look after their children, husbands to look after their wives, and children to look after their parents. Part of the

²⁰⁴ The statute carries with it a "moral odium", see *Greyhound Co. v. Ault* (1956), 238 F.2d 198, 202 (5th Cir.).

²⁰⁵ *Battle v. Kilcrease*, *supra*, footnote 190; *Hallman v. Cushman*, *supra*, footnote 194; *Brooks v. E. J. Willig Transport*, *supra*, footnote 195.

²⁰⁶ *Battle v. Kilcrease and Hallman v. Cushman*, *ibid.*

²⁰⁷ *Supra*, part I.

²⁰⁸ *Mortimore v. Wright* (1840), 6 M & W. 481 (Ex.); *Bazeley v. Forder* (1868), L.R. 3 Q.B. 559, at p. 565.

reason behind this legislation is, of course, to see that dependant members of a family are taken care of by the other members of their family who are able to do so. Much of the motivation is also the desire on the part of governments to minimize the size of their welfare budgets by using the criminal law to force wayward fathers, husbands and children to accord their children, wives and parents some degree of familial support that is not otherwise forthcoming.

The Canadian Criminal Code²⁰⁹ provides that: "Everyone is under a legal duty (a) as a parent . . . to provide necessaries of life for a child under the age of sixteen years; (b) as a husband to provide necessaries of life for his wife; and (c) to provide necessaries of life to a person under his charge if that person (i) is unable by reason of detention, age, illness, insanity or other cause, to withdraw himself from that charge, and (ii) is unable to provide himself with necessaries of life." An offence is committed if any of the above individuals fails, without lawful excuse, to perform that duty if the person to whom it is owed is destitute or the failure to perform the duty endangers the life or the permanent health of that person²¹⁰ and a penalty is provided for its breach.²¹¹ A similar section is found in the Ontario Children's Maintenance Act,²¹² which requires every parent to maintain and educate his child under the age of sixteen years regard being had to the station in life and the means and ability of the child to maintain himself.²¹³ The Penal Code of California requires a father to furnish necessary food, clothing, shelter or medical attendance to his child.²¹⁴ Similar obligations are imposed on a husband toward a wife²¹⁵ and on an adult child toward his indigent parents.²¹⁶ This article will focus on the tort rights of these wives and children who become ill or suffer aggravation of their illness as a result of the failure of the husband or parent to supply food and shelter. Prosser suggests that civil liability may be imposed in these cases since they resemble the obligation already imposed upon a jailer to his prisoner and upon a school to its pupil,²¹⁷ but authority for this is at best only scant. Broad statements may be found in cases to the effect

²⁰⁹ *Supra*, footnote 18, s. 186(1).

²¹⁰ *Ibid.*, s. 186(2).

²¹¹ *Ibid.*, s. 186(3).

²¹² R.S.O., 1960, c. 55. Held *intra vires* in *R. v. Kirkpatrick*, [1959] O.R. 539, 19 D.L.R. (2d) 572.

²¹³ *Ibid.*, s. 1.

²¹⁴ §270.

²¹⁵ §270(a).

²¹⁶ §270(c). See also, California Civil Code, §§176, 196, 206, 242 and 243. Section 207 permits a third person to supply these necessaries where a parent fails to do so and to sue the parents for the reasonable value thereof.

²¹⁷ *Op. cit.*, footnote 1, p. 338.

that "the provision of these necessities is equally a civil obligation . . . [as a criminal one]".²¹⁸ General statements to the opposite effect are also discoverable,²¹⁹ but no court appears to have faced the issue of tort liability arising out of the breach of one of these statutes. Part of the reason for the paucity of decisions is the marital immunity which once prohibited a wife from suing her husband which is now being abolished by statute and by various decisions.²²⁰ No such immunity from suit existed between parent and child in English law, but, for some strange reason, the American courts have created one which is only now beginning to give way.²²¹

There are a few cases where parents sued third persons for expenses incurred because of their statutory duty as parents. Parents were entitled to recover the costs expended for the care of their children who were injured by the defective wiring of the defendant²²² and by being run over by the defendant's dray.²²³ So too, a mother was allowed to recover from her husband amounts required to support her children on the basis of this legislation.²²⁴ In one old case, however, a father was denied recovery for expenses incurred when the defendant made his daughter pregnant,²²⁵ and at least one Canadian judge has suggested that no civil rights can flow from a breach of the section in the Canadian Criminal Code.²²⁶ There is another group of cases where third persons sued parents for services or goods supplied to their children relying on these criminal statutes. Although there is a tendency to deny recovery on the ground of a civil statutory duty, the courts have found implied promises to pay on the part of these parents.²²⁷

In the absence of any real authority one can only surmise whether the courts will choose to advance the policy of these statutes by imposing a civil duty to provide necessities to specified

²¹⁸ *Algiers v. Tracey* (1916), 30 D.L.R. 427 (Que.), where a conviction was upheld for the failure to provide for a wife whose parents were looking after her. See also *Young v. Gravenhurst* (1911), 24 O.L.R. 467, at p. 480 (C.A.).

²¹⁹ *Childs v. Forfar* (1921), 51 O.L.R. 210, at p. 216; *St. Catherine's Hospital v. Sviergula*, [1961] O.R. 164, at p. 167 (Aylen J.).

²²⁰ See Prosser, *op. cit.*, footnote 1, p. 884.

²²¹ *Ibid.*, p. 886.

²²² *Young v. Gravenhurst*, *supra*, footnote 218.

²²³ *Banks v. Shedden Forwarding Co.* (1906), 11 O.L.R. 483 (C.A.).

²²⁴ *Feasey v. Feasey*, [1946] O.W.N. 145 (Master).

²²⁵ *Grimmell v. Wells* (1844), 7 M & G. 1033 (C.P.).

²²⁶ Meredith J., dissenting, in *Banks v. Shedden Forwarding Co.*, *supra*, footnote 223, at p. 492, and in *Childs v. Forfar*, *supra*, footnote 219, at p. 211. See also, Aylen J. in *St. Catherine's Hospital v. Sviergula*, *supra*, footnote 219.

²²⁷ See *Vernon Jubilee Hospital v. Pound*, [1932] 2 D.L.R. 813; *St. Catherine's Hospital v. Sviergula*, *ibid.*; *Childs v. Forfar*, *ibid.* See, also, *Baseley v. Forder*, *supra*, footnote 208.

relatives or whether the courts will refrain from tampering with the common law. It is suggested that as the family immunities disappear, and the social problems attendant on broken homes expand and as government welfare costs continue to increase, the courts will begin to create tort duties for failure to comply with this legislation. Since there is no problem of selection, since the lack of action here is so morally reprehensible to virtually everyone, and, since support can be provided without any physical danger, the eventual imposition of a tort duty appears inevitable. The presence of the criminal statute will facilitate and hasten that development.

4. *Abutter ordinances.*

The requirement to clear ice and snow and to repair sidewalks abutting their property is frequently placed upon property owners by municipal ordinances or by-laws. These enactments normally impose a small fine for failure to comply and often provide that upon notice to the owner the work may be done by the municipality and the cost may be charged to the owner. The breach of this criminal legislation has not given rise to a new tort duty of positive action in the absence of express language to the contrary²²⁸ anywhere except in West Virginia.²²⁹ An abutting property owner is not made civilly liable for criminal failure to clear snow or ice from the public sidewalk in front of his property, unless, by some positive act, he has injured someone.²³⁰ In so holding, most courts have said that the primary purpose of these ordinances is to reduce the cost to the municipality of keeping their streets in repair, and that the protection of the pedestrian is only a by-product of these enactments.²³¹

The leading Canadian case is *Commerford v. Board of School Commissioners of Halifax*,²³² where a by-law of the City of Halifax requiring abutters to clear ice and snow from the adjoining sidewalks was broken. In deciding that there was no civil liability created by this breach, the court remarked about the absence in the by-law of any intention to confer civil liability.²³³ The court pointed out that, since the by-law contained a provision creating

²²⁸ *Willis v. Parker*, *supra*, footnote 108; *Texas Co. v. Grant*, *supra*, footnote 108.

²²⁹ *Rich v. Rosenshine* (1947), 131 W. Va. 30, 45 S.E. 2d 499; *Barniak v. Grossman* (1956), 141 W. Va. 760, 93 S.E. 2d 49.

²³⁰ Restatement of the Law of Torts, §288; *Morris*, *loc. cit.*, footnote 21, at p. 147.

²³¹ *King v. Crosbie Inc.*, (1942), 91 Okl. 525, 131 P.2d 105.

²³² *Supra*, footnote 17.

²³³ *Ibid.*, at p. 214.

civil liability for the breach of certain sections in the act, none would be imposed for the breach of any other sections of the by-law without a clear statutory direction to that effect. The municipality had not been empowered to create liability²³⁴ and the inadequacy of the penalty evinced a legislative benevolence toward homeowners rather than the intention to impose additional civil sanction.²³⁵ Relying on Thayer's article,²³⁶ the Nova Scotia court refused to create a civil duty toward pedestrians on the basis of the by-law, which decision has not been challenged.²³⁷

A similar approach has been taken by the American courts which have held, generally, that no intention to confer a civil cause of action is evinced by the ordinance. They invoke the strict rules for statutory interpretation and say something like "If it had been the intention of the Legislature to cast upon property owners . . . the primary duty of keeping the streets reasonably safe . . . it doubtless would have found apt words to create such a duty",²³⁸ or they may say "The court is to go no faster and no farther than the Legislature has gone".²³⁹ Another favourite device of the court is to say that the statute created a public duty only and did not create any private duty to individual pedestrians.²⁴⁰ Sometimes, it is said, that the statute was meant only as an aid to the city in performing its primary duty of snow removal,²⁴¹ or that the owner was no more the cause of the injury than the pedestrian himself.²⁴²

But these statements are specious, and merely disguise the true reasons for decision of which several valid ones exist. One reason for the refusal to expand tort liability here is that these criminal duties are imposed by inferior legislating bodies which are distrusted by the courts.²⁴³ This is evidenced in the treatment by some courts of ordinance breaches as mere evidence of negligence whereas they treat statutory breaches as negligence *per se*.²⁴⁴ In one case

²³⁴ *Ibid.*, at p. 216. ²³⁵ *Ibid.*, at p. 218. ²³⁶ *Loc. cit.*, footnote 21.

²³⁷ *Hagen v. Goldfarb* (1961), 28 D.L.R. 2d 746 (N.S.S.C.). Liability was imposed for positive negligence and nuisance, however.

²³⁸ *Stevens v. Nelligon* (1933), 116 Conn. 307, at p. 312, 164 Atl. 661, at p. 663.

²³⁹ *Howard v. Howard* (1921), 120 Me. 479, at p. 480, 115 Atl. 259, at p. 260; *Willoughby v. City of New Haven* (1935), 123 Conn. 446, 197 Atl. 85.

²⁴⁰ *Clark v. Stoudt* (1944), 73 N.D. 165, 12 N.W. 2d 708; *King v. Crosbie*, *supra*, footnote 231, at p. 108 "protect public at large"; *Rees v. Cobb & Mitchell Co.* (1930), 131 Ore. 665, 283 Pac. 1115 "duty to city", at p. 1116.

²⁴¹ *Western Auto Supply v. Phelan* (1939), 104 F.2d 85 (9th Cir.); *King v. Crosbie*, *ibid.*, at p. 108.

²⁴² *Clark v. Stoudt*, *supra*, footnote 240, at p. 710 (N.W.).

²⁴³ See Alexander, *loc. cit.*, footnote 21, at p. 258.

²⁴⁴ See Prosser, *op. cit.*, footnote 1, p. 203; *Sellers v. Cline* (1946), 160 Pa Super. 85, at p. 86, 49 A.2d 873, at p. 874.

a statute imposed civil liability on anyone who caused injury to another while in breach of any other statute, but the court held that it would not be applied to a breach of an ordinance rather than a statute.²⁴⁵ Implicit in this distrust of municipalities, is the fear of unwise laws being passed, loss of uniformity of the common law from one town to the next and other such gnawing doubts.

Moreover, the courts probably do not sympathize with the policy of these ordinances. Insofar as they diminish the cost and expense of municipal government alone, the courts do not object to the passage of these ordinances,²⁴⁶ but they do not favour the transfer of the primary burden of road care from municipalities to thousands of individuals who may or may not exercise the responsibility adequately. "Responsibility would be divided to the detriment of the public service . . ." ²⁴⁷ and the "Municipality would relax its care and supervision",²⁴⁸ they proclaim. As long as the city is enlisting property owners as deputy street commissioners to assist it in its primary responsibility, the court will not object,²⁴⁹ however, it is a different matter when the municipality attempts to relieve itself of this responsibility.

There is also the feeling of unfairness toward the abutter who is not only made to tend the sidewalks on behalf of the municipality, but to bear a civil obligation to anyone injured by his failure to do so.²⁵⁰ In addition, there is the prevailing judicial opposition to new tort obligations and departures from time-worn practices. Since at common law abutters were not obligated to care for the sidewalk, a criminal municipal ordinance should not change that without clearly so stating. That would be to effect too "radical a change"²⁵¹ which "would add greatly to common law liabilities"²⁵² and might lead to civil obligations that would be "formidable".²⁵³

There is no urgency to create liability here in order to compensate the injured person because the cases are very often contests to resolve which of two defendants will bear the costs of these

²⁴⁵ *Equitable Life v. McLellan* (1941), 286 Ky 17, 149 S.W. 2d 730.

²⁴⁶ *Ouelette v. Miller* (1936), 134 Me. 162, 183 Atl. 341; *Kirby v. Roylston Market* (1859), 80 Mass. 249, 74 Am. Dec. 682; *Willoughby v. City of New Haven*, *supra*, footnote 239.

²⁴⁷ *Equitable Life v. McLellan*, *supra*, footnote 245, at p. 753 (S.W.).

²⁴⁸ *Ibid.*

²⁴⁹ See *Clark v. Stoudt*, *supra*, footnote 240.

²⁵⁰ *Grooms v. Union Guardian Trust Co.*, (1944), 309 Mich. 437, 15 N.W. 2d 698; *Taggart v. Bouldin* (1933), 111 N.J.L. 464, 168 Atl. 570.

²⁵¹ *Willoughby v. City of New Haven*, *supra*, footnote 239, at p. 89 (Atl.).

²⁵² *Grooms v. Union Guardian Trust Co.*, *supra*, footnote 250, at p. 729 (N.W.).

²⁵³ *Willoughby v. City of New Haven*, *supra*, footnote 239, at p. 89 (Atl.).

accidents on the sidewalk, rather than to decide whether they will be borne by anyone.²⁵⁴

In conclusion, although the courts disguise the true reasons for their decisions with talk of intention and public duties, sound policy reasons justify their virtually unanimous refusal to create a new tort duty on the basis of breach of an abutter ordinance. The prevailing judicial opinion that the power of municipalities should be kept in check, that dissipation of responsibility for the care of sidewalks should be avoided, and the general reluctance to open new areas of tort liability will probably perpetuate this position. The countervailing policy pulls are not compelling, since the municipality is usually available for suit if the abutter is not. Nor is the conduct of the abutter in the least morally shocking. However, these cases do not support the general principle that Thayer derives from them to the effect that courts should never follow the criminal law to create new duties.²⁵⁵ In the abutter cases there just is no compelling reason for them to do so as there is in other cases.²⁵⁶

5. Other legislation.

There are many other assorted instances where courts have used criminal legislation to advance into new areas of tort liability. One very striking example of this proclivity was *Pine Grove Poultry Farm v. Newtown*,²⁵⁷ where the defendant negligently manufactured feed which killed the plaintiff's ducks. The court relied on a criminal statute which outlawed the sale of defective feed to create a new manufacturers duty in property damage cases, which had not yet been recognized at that time. Prior to the *Newtown*²⁵⁸ case, manufacturers owed a duty to prevent only personal injuries.²⁵⁹ Soon afterwards, the court discarded the legislative crutch and held manufacturers liable for property damage without invoking the statutory violation.²⁶⁰ Another such case is *Frankston v. Cohen*,²⁶¹ where an Australian court relied to some degree upon

²⁵⁴ In the *Willoughby* case, *ibid.*, for example, the defendant bank was relieved of responsibility on the basis of the abutter ordinance, but the city was held liable. Sometimes municipalities are relieved of civil liability on the basis of the immunity, but often, a statutory liability is expressly created.

²⁵⁵ Thayer, *loc. cit.*, footnote 21, at p. 329.

²⁵⁶ Morris, *loc. cit.*, footnote 21, at p. 148, in *Studies, op. cit.*, footnote 25.

²⁵⁷ (1928), 248 N.Y. 293, 162 N.E. 84.

²⁵⁸ *Ibid.*

²⁵⁹ *McPherson v. Buick Motor Co.* (1916), 217 N.Y. 382, 111 N.E. 1050.

²⁶⁰ *Genesee County Patrons v. Sonneborn Sons, Inc.* (1934), 263 N.Y. 463, 189 N.E. 551.

²⁶¹ (1959-60), 102 C.L.R. 607 (H.C. Aust.).

a statutory duty in imposing liability for a negligent mis-statement made by a municipal accountant prior to the celebrated *Hedley, Byrne v. Heller*²⁶² decision, which created this new duty in English law without reliance on any statutory breach.

The Ontario courts have utilized legislation making it unlawful for animals to roam the highways to create a duty of care on the part of their owners where at common law none existed.²⁶³ These cases accepted the view that no duty was owed at common law, but manufactured a legislative intention to create civil liability.²⁶⁴ After the statute was amended in 1939 matters became rather confused²⁶⁵ until the Supreme Court of Canada finally held that a duty to use reasonable care with regard to animals on modern highways exists independently of any legislation.²⁶⁶

These cases demonstrate that the courts may use criminal legislation as a crutch to expand the interests protected by tort law, where a more blatant exercise of judicial law-making power appears inadvisable. The statutory crutch may be discarded after it has acted as a useful, if not an indispensable, tool.²⁶⁷

Cases may be found where liability was imposed for criminally failing to supply fire escapes on buildings²⁶⁸ for neglecting to convey children to school²⁶⁹ and for the omission to remove a trolley pole from the highway in violation of legislation.²⁷⁰ Where as a result of a breach of a car-locking ordinance the plaintiff was run over by a thief who drove the truck away,²⁷¹ where a public official failed to submit a petition of right contrary to the statutory provisions²⁷² and where the defendant refused to deliver a ballot to a person with voting rights²⁷³ civil responsibility was imposed. Where a court is sympathetic to the policy of the statute and wishes to

²⁶² [1964] A.C. 465.

²⁶³ *Searle v. Wallbank*, [1947] A.C. 341.

²⁶⁴ *Patterson v. Fanning*, [1961] 2 O.L.R. 462 (municipal by-law); *McMillan v. Wallace* (1929), 64 O.L.R. 4, [1929] 3 D.L.R. 367 (C.A.); *Direct Transport Co. v. Corvell*, [1938] O.R. 365, [1938] 3 D.L.R. 456 (C.A.).

²⁶⁵ Cf. *Atkinson v. Fleming*, [1956] O.R. 801, [1956], 5 D.L.R. (2d) 309 (C.A.), aff'd in [1959] S.C.R. 513, (1959) 18 D.L.R. (2d) 81; *Noble v. Calder*, [1952] O.R. 577, [1952] 3 D.L.R. 651 (C.A.).

²⁶⁶ *Fleming v. Atkinson*, *ibid.* There was some difference of opinion among the members of the court. See Alexander, *loc. cit.*, footnote 21, at p. 256, footnote 54.

²⁶⁷ *Morris*, *loc. cit.*, footnote 21, at p. 146.

²⁶⁸ *Solomons v. Gertzenstein Ltd.*, [1954] 2 Q.B. 243; *Love v. New Fairview Corp.* (1904), 10 B.C.R. 330 (C.A.).

²⁶⁹ *Riding v. Elmhurst School District*, [1927] 2 W.W.R. 159, [1927] 3 D.L.R. 173 (Sask. C.A.).

²⁷⁰ *Simonsen v. Thorin* (1931), 120 Neb. 684, 234 N.W. 628.

²⁷¹ *Ross v. Hartman* (1943), 78 App. D.C. 217, 139 F.2d 14 (C.A.D.C.).

²⁷² *Norton v. Fulton* (1907), 39 S.C.R. 202, aff'd [1908] A.C. 451 (P.C.).

²⁷³ *Anderson v. Hicks* (1902), 35 N.S.R. 161 (C.A.).

advance that policy, it may create a new duty unless there are strong contrary policies militating against this.

There are many cases where the courts have refrained from following the criminal law and have abstained from imposing tort liability for criminal non-feasance. Perhaps, the best known of these cases is *Cutler v. Wandsworth Stadium*,²⁷⁴ where a bookmaker was denied recovery against the defendant which failed to provide him with adequate space for his endeavours at a dog-racing track as required by the Betting and Lotteries Act. The House of Lords barely veiled its disapproval of the policy of the statute, at least insofar as it aided the bookmakers to increase their profits, when Lord Simonds said that the statute is not "the charter of the bookmakers".²⁷⁵ The courts distinguished these statutes from those which were passed to better the lot of workmen by placing new duties upon employers for the benefit of their workmen.²⁷⁶ The court concluded by proclaiming that the penalties provided were "effective sanctions" and stood "in no need of aid from civil proceedings".²⁷⁷ This decision contrasts markedly to that in *Monk v. Warbey*,²⁷⁸ where the court desired to promote legislative policy. Here no such desire was present for obvious reasons.

Other cases abound where the court held firm with the common law and shunned expansion on the basis of criminal statutes. It has been held that no tort action would lie for a breach of anti-combines legislation in Canada,²⁷⁹ nor would an action for wages lie on the basis of a criminal statute breach,²⁸⁰ and no action was said to be maintainable by a criminal whose name was wrongfully published contrary to an Identification of Criminals Act.²⁸¹ In all of these cases, the courts were unwilling to use the breach of criminal statutes to create tort liability since the policies of the statutes did not appear worthy of further advancement.

The fate of section 110(b) of the Criminal Code of Canada,²⁸² which creates an offence if someone "omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so", is still un-

²⁷⁴ *Supra*, footnote 102. ²⁷⁵ *Ibid.*, at p. 404. ²⁷⁶ *Ibid.*, at p. 413.
²⁷⁷ *Ibid.*, at p. 414. See also *Green v. Portsmouth*, [1953] 2 All E.R. 102 (C.A.).

²⁷⁸ *Supra*, footnote 102.
²⁷⁹ *Transport Oil v. Imperial Oil*, [1935] O.R. 111, aff'd at p. 215; But cf. *Duff C.J. in Philco Products v. Thermionics Ltd.*, [1940] 4 D.L.R. 1, at p. 3.

²⁸⁰ *Outen v. Stewart*, [1932] 3 W.W.R. 193, 40 Man. R. 557.

²⁸¹ *Pullan v. McLellan*, [1946] 2 D.L.R. 606 (B.C.H.C.).

²⁸² *Supra*, footnote 18.

decided with regard to a civil duty. The fact that the Ontario Workmen's Compensation Act²⁸³ provides benefits to such a person as an employee of the Crown may impede the creation of a new duty, at least in Ontario, since it is not urgently required by the victims who are looked after under this statutory scheme.

VII. *The Limitations.*

The courts have constructed a body of limiting principles so as to prevent too wide a use of criminal legislation to create new tort duties. These limitations resemble very closely their counterparts which limit the operation of the legislation where it is used to concretize specific standards of care.²⁸⁴

First, the failure to respond to the legislative dictates must cause some harm to the person complaining.²⁸⁵ It will not do to have people suing wrongdoers who violate the criminal law if they have suffered no harm as a result of that wrongdoing. Just as negligence in the air will not do,²⁸⁶ neither will crime in the air. If his failure to obey the hit and run statute did not contribute to the death or further injury of the victim, the defendant will not be held liable,²⁸⁷ as where the victim died instantly or where others took him immediately to the hospital.²⁸⁸ So too, where the neglect to insure in violation of a statute did not contribute to the inability of a victim to recover, no liability will be imposed.²⁸⁹ This will presumably be the case where someone falls on uncleared ice due to his own negligence rather than to the breach of an abutter ordinance, where the wife of the wayward husband dies while being cared for by her father or where the help of a summoned bystander would have been of no avail in preventing injury to a police officer. This is only an application of the fundamental negligence principle which demands that offending conduct culminate in harm to the plaintiff for an action to lie.

²⁸³ R.S.O., 1960, c. 437, s. 122.

²⁸⁴ See Fleming, *op. cit.*, footnote 1, p. 133; Prosser, *op. cit.*, footnote 1, p. 193.

²⁸⁵ See *Daniels v. Vaux*, *supra*, footnote 183; See, generally, Cole, *Windfall and Probability: A Study of "Cause" in Negligence Law* (1964), 52 Calif. L. Rev. 459; Hart and Honoré, *Causation in The Law* (1959).

²⁸⁶ *Palsgraf v. Long Island R. Co.* (1928), 248 N.Y. 339, 162 N.E. 99, per Cardozo, C.J.

²⁸⁷ *Boyer v. Gulf, C.&S.F.R. Co.* (1957), 306 S.W. 2d 215 (Tex. Civ. App.); *Hallman v. Cushman*, *supra*, footnote 194; *Brooks v. Willig Transport Co.*, *supra*, footnote 195; But *cf.* language in *Battle v. Kilcrease*, *supra*, footnote 190.

²⁸⁸ *People v. Scofield* (1928), 203 Cal. 703, 265 Pac. 914; *People v. Martin* (1931), 114 Cal. App. 337, 300 Pac. 108.

²⁸⁹ *Daniels v. Vaux*, *supra*, footnote 183.

Second, the harm that is caused must be of a kind which the legislation was aimed at preventing. Only such harm which falls within the scope of the risk contemplated by the provision is compensable.²⁹⁰ *Gorris v. Scott*²⁹¹ is as applicable here as it is in negligence *per se* cases. It will be recalled that in this case certain types of pens were required to protect animals against disease. As a result of a breach of this legislation, the sheep were swept overboard. No liability was imposed, since the risk which culminated in the harm was not the risk against which the legislation was directed. Although this principle poses some problems, often due to judicial narrow-sightedness,²⁹² it will doubtless be applied by the courts in these creation of duty cases. Where a victim of an uninsured vehicle in England fails to recover because he is unable to prove that the driver was at fault, the fact that the driver committed a breach of statute will aid him not. Nor will it assist the victim of a hit and run violation if, while he lies helpless on the road, his enemy appears and intentionally shoots him.²⁹³ So too, it will not avail a pedestrian who is run over on Sunday morning to point to a breach by the driver of a Sunday Observance law, of a law requiring tail-lights that function or of a licensing statute.²⁹⁴ The Massachusetts "outlaw driver rule" will not likely be exported beyond the borders of that great Commonwealth.²⁹⁵ The desire to inflict additional punishment on criminal offenders, and to flush out undiscovered wrongdoers will not outweigh the requirement that the risk which culminates in the injury must and should be one which the legislation was aimed at eliminating.

Third, the plaintiff must bring himself within the protective legislative umbrella. If he is not one of those whom the criminal statute attempted to protect, the tort court will be loath to give him a civil cause of action. Because of this limitation, the courts have refused to extend *Monk v. Warbey*, so as to allow a servant of the uninsured owner to recover, because the legislation was designed to protect third persons and not the employees of the owner.²⁹⁶ One may quarrel with this application of the doctrine in specific instances, but, nevertheless, it will be utilized by the courts to deny recovery to such people who may suffer a heart

²⁹⁰ See, generally, Fleming, *op. cit.*, footnote 1, p. 133.

²⁹¹ (1874), L.R. 9 Ex. 125.

²⁹² See Fleming, *op. cit.*, footnote 1, p. 133.

²⁹³ Cf. if he is negligently hit again or if he is robbed.

²⁹⁴ See Fricke, *loc. cit.*, footnote 21, at p. 253.

²⁹⁵ *Ibid.*

²⁹⁶ *Semsex Ltd. v. Gladstone*, *supra*, footnote 182; *Gregory v. Ford*, *supra*, footnote 182.

attack as a result of seeing a victim of a hit and run accident bleed to death without help. The negligence *per se* cases will undoubtedly be duplicated in this context and will probably demonstrate on occasion the same lack of intelligent application.

The tort courts have in the past said that before they could rely on a statute, it must be designed to protect a particular class of people and not the general public.²⁹⁷ Sometimes the court stated the issue in terms of whether the legislature intended to create a public duty alone or a duty to individuals as well. It has been indicated by Lord Justice Atkin in *Phillips v. Britannia Hygienic Laundry*,²⁹⁸ that "it would be strange if a less important duty which is owed to a section of the public may be enforced by action, while a more important duty owed to public cannot".²⁹⁹ More astute courts have now held that as long as the plaintiff brings "himself within the benefit of the act" he may rely on its breach.³⁰⁰ It obviously cannot matter whether the statute was designed to benefit a particular class or society as a whole, as long as the person claiming the protection of the statute was someone whom the legislature sought to protect.³⁰¹ Some statutes are broadly aimed and others are more narrowly directed. The earlier test was merely an unhappy verbal formulation of a rational limiting device, which resulted largely from an over-reliance on the search for legislative intention.³⁰² Both the unreal legislative intention test, as well as the related public duty test, should be discarded.

The courts will therefore require that the conduct which violates the criminal statute cause damage to the plaintiff, that the harm is one which the statute aimed at preventing, and that the plaintiff is one of those to be benefitted by the enactment. They are, thus, being consistent with their use of statutes to fix safety standards, which is understandable and desirable.

Conclusion

The courts have imposed tort liability for criminal nonfeasance, giving some encouragement to Good Samaritans in several isolated situations. The new legislation which creates criminal duties of positive action has aided the courts to increase the number of instances where there is a civil duty to render assistance to one's fellow man. Unfortunately, in so doing the courts have disguised

²⁹⁷ See Fleming, *op. cit.*, footnote 1, p. 128.

²⁹⁸ *Supra*, footnote 146.

²⁹⁹ *Ibid.*, at pp. 841-842.

³⁰⁰ *Ibid.*

³⁰¹ See *Commerford v. Board of School Commissioners, supra*, footnote 17, at p. 212. See, also, *Monk v. Warbey, supra*, footnote 102.

³⁰² See Alexander, *loc. cit.*, footnote 21.

their deeds with discussion of the intention of the legislature to confer civil rights which in most cases has been an unreal quest for a non-existent legislative intention leading to confusion rather than to illumination. This meaningless pursuit should be abandoned so that the real issues can be faced and resolved.

Any search for another theory to replace the intention theory was doomed to failure since no one rationale, however brilliant, can hope to resolve all the complex policy conflicts that are presented in the cases. The theory proposed by Thayer³⁰³ has proved too rigid, although it has helped to nurture the negligence *per se* doctrine. The courts need various theories to assist them in their task. Perhaps the best that can be offered is that the existence of a criminal statute requiring positive conduct should be a factor which a court should consider when faced with a tort action based on the offending conduct in addition to the other factors and policies involved in the case.

Where the policy of the statute is considered important, the courts may advance that policy by providing a civil remedy both as compensation for the victim and as an extra deterrent to the wrongdoer. This is consistent with the notions of comity, democracy and superior legislative expertise. The court tends to do this more readily where the conduct of the defendant, as in the hit and run cases, is worthy of strong moral condemnation, where there is a likelihood of insurance availability, where the defendant may be easily selected and where no physical danger to the defendant is involved. The fact that a rescuer may recover damages should spur further development. On the other hand, where the courts disapprove of the legislative policy, they will revert to their ancient hostility toward statutes and refuse to extend the scope of their operation beyond the creation of criminal responsibility.

Where the legislation in question is a municipal ordinance or other subordinate legislation, the court is less likely to impose civil liability for its breach. The prejudice of courts toward this type of legislation, which is indicated elsewhere, militates against its use for this purpose. Fears that the myriad variations will subvert the commonness of the common law, lack of warning, the possibility of politically influenced and ill-considered ordinances and other considerations justify this view.

Always the courts will operate within the normal limitations of tort law. The conduct must cause loss to the plaintiff, the risk must be one which the legislation hoped to curtail and the plaintiff

³⁰³ *Loc. cit.*, footnote 21.

must be within the group to be protected. These latter requirements are due largely to a wise deference being paid to the legislative will.

That the court will not rely as readily on criminal legislation to create a new duty as it will to fix the standard of care where a duty already exists cannot be denied, since this is a more drastic step for a court to take,³⁰⁴ but the courts have created new tort duties by analogy to criminal legislation and it is submitted that such steps are proper and justified if done with discretion and candour,³⁰⁵ Thayer, Gregory, Williams and Fleming notwithstanding.

³⁰⁴ *Alexander, loc. cit.*, footnote 21.

³⁰⁵ Wright, Note (1941), 19 Can. Bar Rev. 51, at p. 52; *Alexander, loc. cit.*, *ibid.*, at p. 276; Morris, *loc. cit.*, footnote 21.